FINAL REPORT

INTERIM PAYMENT OF DAMAGES

Law Reform Commission of Nova Scotia
February 2001

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

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Law Reform Commission of Nova Scotia

To: The Honourable Michael G. Baker, Q.C.
Minister of Justice

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report on Interim Payment of Damages.

Gregory North, Q.C.
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INTERIM PAYMENT OF DAMAGES

SUMMARY

Damages are sums of money, awarded by a court to compensate a person (the *plaintiff*) for loss or harm resulting from the wrong of another person (the *defendant*). *Special damages* compensate the plaintiff for pre-trial financial losses or expenditures which result from a defendant's wrong. *General damages* compensate the plaintiff for intangible results of a wrong, such as pain and suffering, mental distress and loss of quality of life. General damages can also include amounts for lost future income and diminished future earning capacity. To obtain damages, the plaintiff commences a court proceeding or *action*. The aim of an action is to have the court declare the defendant legally responsible or *liable* to compensate the plaintiff. Ordinarily, damages are only awarded at the end of a trial, if the defendant has been found liable, and all issues between the plaintiff and the defendant have been resolved. The court may reduce the amount of a damages award, to take into account any *contributory negligence*, the extent, if any, to which the plaintiff caused in part his or her injury and therefore the amount of damages suffered. If applicable, the court will also reduce a damages award by a proportion attributable to the plaintiff's failure to *mitigate* or minimize damages.

Interim payment of damages involves the court ordering the defendant to pay a portion of damages to the plaintiff before trial. In 1996, amendments were made to the Nova Scotia *Civil Procedure Rules*, which govern how actions begin and proceed. The amendments permit interim payment of damages in actions where the court is satisfied that the defendant has admitted liability, or the defendant's liability has been determined by the court. In addition, in *personal injury actions*, in which the plaintiff seeks compensation for bodily or physical injuries, interim payment is only available where the defendant is covered by insurance, is a public authority, or has adequate financial resources with which to make an interim payment.

Some people believe that the law relating to interim payment of damages should be expanded, to permit interim payment when the defendant's liability has not yet been established. This change, they maintain, would enable considerably more plaintiffs to apply for interim payment. Other people are concerned, however, that to allow for interim payment when liability is still in question would not be fair.

In January 2000, The Commission published a Discussion Paper, *Interim Payment of Damages*. The Commission took the view that interim payment of damages in Nova Scotia should be made more accessible, but in a balanced manner, which takes into account the interests of both plaintiffs and defendants. The Discussion Paper proposed that in addition to its current availability, interim payment of damages should also be possible before trial, where a court is satisfied that the plaintiff will succeed at trial. Among its other proposals, the Discussion Paper suggested that both special and general damages should be available for inclusion in an interim payment, that a plaintiff should not be required to show need as part of an interim payment application, that a plaintiff's contributory negligence should not by itself

prevent access to interim payment of damages, and that information concerning any applications for interim payment of damages should not be disclosed to the trial judge until the trial ends and judgment is given.

Having taken into account all comments received concerning the Discussion Paper, the Commission has prepared this Final Report.

Recommendations for reform

- The Nova Scotia rule pertaining to interim payment of damages should be expanded, to allow for interim payment where liability is still in question. The rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.

- To satisfy a court in this context means that a plaintiff will "almost certainly succeed on the question of liability at least to some extent."

- A liberal approach should be used in applying the interim payment rule, which should be available in all types of civil proceedings.

- Both special and general damages should be available, if relevant, for inclusion in an interim payment.

- The interim payment rule should not require a plaintiff to show need.

- A plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

- Mitigation of damages should be included as a factor which may be taken into account by the court when deciding the amount of an interim payment.

- The interim payment rule should not include any specific formulas for determining the amount of payment.

- The interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.

- In order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

- If the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning any applications for interim payment of damages should ordinarily not be disclosed to the trial judge until after the judgment is given.

- Courts should have the discretion to waive the restrictions on revealing details pertaining to interim payment.

- At the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant.

- It should be possible for a court to award an interim payment based upon damages which are expected to be incurred up to and including trial.

- A court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.

- The relevant time from which to allow an interim payment application to be made should be the close of pleadings.

PAIEMENT PROVISOIRE DE DOMMAGES-INTERETS

SOMMAIRE*

Les *dommages-intérêts* sont une somme d'argent, dont le paiement est ordonné par le tribunal afin de dédommager une personne (le *demandeur*) pour une perte ou un préjudice résultant de la faute commise par une autre personne (le *défendeur*). Les *dommages-intérêts spéciaux* dédommagent le demandeur pour les pertes ou dépenses financières encourues avant le procès et qui résultent de la faute du défendeur. Les *dommages-intérêts généraux* dédommagent le demandeur pour les conséquences intangibles d'une faute, telles que les blessures et souffrances, la souffrance morale et la perte de qualité de vie. Les dommages-intérêts généraux peuvent aussi inclure des sommes pour le dédommagement de la perte de revenus futures et de la diminution de la capacité de générer des revenus futurs. Le demandeur qui désire obtenir des dommages-intérêts doit intenter une procédure judiciaire ou *action*. Le but de l'action en justice est d'obtenir que le tribunal déclare que le défendeur est juridiquement *responsable* et doit dédommager le demandeur. La décision d'octroyer des dommages-intérêts est habituellement prise à l'issue du procès si le défendeur a été jugé responsable et alors que toutes les questions entre le demandeur et le défendeur ont été résolues. Le tribunal peut réduire les dommages-intérêts en raison d'une *faute contributive* du demandeur qui a ainsi contribué au préjudice subi. De plus, le cas échéant, le tribunal réduira le montant des dommages-intérêts proportionnellement au défaut du demandeur de minimiser ou d'*atténuer* le préjudice subi.

Le paiement provisoire des dommages-intérêts survient lorsque le tribunal ordonne au défendeur de payer une partie des dommages-intérêts au demandeur, avant le procès. En 1996, des amendements ont été apportés aux *Règles de procédure civile* de la Nouvelle-Ecosse traitant de la façon d'intenter des actions en justice et leur déroulement. Ces amendements permettent le paiement provisoire de dommages-intérêts lorsque le tribunal est certain que le défendeur a admis sa faute et responsabilité ou que le défendeur a été reconnu responsable par le tribunal. De plus, dans les cas d'actions en *responsabilité civile pour dommages corporels*, le paiement provisoire de dommages-intérêts n'est possible que si le défendeur est couvert par une police d'assurance, est une autorité publique ou possède des ressources financières suffisantes pour faire ce paiement provisoire.

Certaines personnes sont d'avis que les règles juridiques relatives au paiement provisoire de dommages-intérêts devraient être élargies afin de permettre le paiement provisoire même lorsque la faute du défendeur n'a pas encore été déterminée. Cette modification, selon elles, permettrait à un nombre accru de demandeurs de demander le paiement provisoire de

* Traduit de l'anglais par Me Nathalie Bernard, LL.M. (Dalhousie University), LL.B. (Dalhousie University), LL.B. (Université Laval).

dommages-intérêts. Par contre, d'autres croient que de permettre le paiement provisoire de dommages-intérêts lorsque la faute n'a pas encore été déterminée serait injuste.

En janvier 2000, la Commission a publié un Document de réflexion intitulé *Paiement provisoire de dommages-intérêts*. La Commission estimait que le paiement provisoire de dommages-intérêts en Nouvelle-Ecosse devrait être plus accessible, tout en étant plus équilibré, et devait prendre en considération les intérêts du demandeur et du défendeur. Le Document de réflexion proposait qu'en plus des cas actuels de paiement de dommages-intérêts provisoires, ce paiement provisoire devrait aussi être permis avant le procès lorsque le tribunal estime que des dommages-intérêts seront octroyés au demandeur à l'issue du procès. Parmi ses suggestions de réforme, le Document de réflexion préconisait que tant les dommages-intérêts spéciaux que les dommages-intérêts généraux devraient pouvoir faire l'objet d'un paiement provisoire, que le demandeur ne devrait pas avoir à démontrer qu'il a besoin de ce paiement provisoire, que la faute contributive du demandeur en elle-même ne devrait pas empêcher le demandeur d'avoir accès aux bénéfices du paiement provisoire, et que les informations à l'appui de toute demande de paiement provisoire de dommages-intérêts ne devraient pas être divulguées au juge du procès jusqu'à ce que le jugement final soit rendu.

La Commission a préparé le présent Rapport final sur la base de tous les commentaires reçus dans le cadre du Document de réflexion.

Recommandations pour une réforme

- Les règles néo-écossaises en matière de paiement provisoire de dommages-intérêts devraient être élargies afin de permettre le paiement provisoire lorsque la faute et responsabilité sont toujours en litige. Les règles actuelles pourraient être modifiées de façon appropriée et prévoir le paiement provisoire lorsque la faute et la responsabilité sont toujours en litige en posant comme exigence que le tribunal soit satisfait que le demandeur gagnera son procès.

- Satisfaire le tribunal que le demandeur gagnera son procès dans ce contexte signifie qu'il " est presque certain que le tribunal trouvera le défendeur responsable entièrement ou partiellement ".

- Une approche libérale devrait être adoptée lors de l'application de la règle du paiement provisoire de dommages-intérêts et cette règle devrait s'appliquer dans tous les types de procès civils.

- Le paiement provisoire devrait pouvoir couvrir tant les dommages-intérêts spéciaux et que généraux selon la pertinence.

- Les règles relatives au paiement provisoire ne devraient pas exiger que le demandeur démontre qu'il a besoin de ce paiement provisoire.

- La faute contributive du demandeur en elle-même ne devrait pas empêcher le demandeur d'avoir accès aux bénéfices du paiement provisoire de dommages-intérêts mais devrait être prise en considération par le tribunal.

- Le devoir d'atténuation du préjudice devrait constituer un facteur qui pourra être pris en ligne de compte par le tribunal lorsqu'il décidera de la somme à payer à titre de paiement provisoire.

- Les règles relatives au paiement provisoire ne devraient pas inclure de formules spécifiques pour l'évaluation du paiement.

- Les règles relatives au paiement provisoire devraient se limiter aux situations où il appert que le défendeur possède les ressources nécessaires pour effectuer ce paiement provisoire.

- Pour pouvoir obtenir une ordonnance de paiement provisoire contre un défendeur en particulier, le demandeur doit prouver au tribunal qu'il est certain ou probable que le défendeur sera condamné à lui payer des dommages-intérêts.

- En cas d'élargissement des règles relatives au paiement provisoire au cas où la faute et responsabilité seraient encore en litige, les informations à l'appui de toute demande de paiement provisoire de dommages-intérêts ne devraient pas, en principe, être divulguées au juge du procès jusqu'à ce que le jugement final soit rendu.

- Les tribunaux devraient avoir le pouvoir de faire des exceptions à la règle de non-divulgation des informations relatives au paiement provisoire de dommages-intérêts.

- Au moment du jugement final, le tribunal, dans le calcul des dommages-intérêt définitifs, devrait prendre en considération le paiement provisoire effectué par le défendeur et faire les ajustements nécessaires entre les parties, notamment, le cas échéant, une ordonnance de remboursement de sommes par le demandeur au défendeur.

- Le tribunal devrait avoir le pouvoir d'octroyer le paiement provisoire de dommages-intérêts pour des dommages dont on s'attend qu'ils soient subis jusqu'à la date du procès.

- Le tribunal devrait pouvoir émettre une ordonnance additionnelle ou une ordonnance modificative relativement à un paiement provisoire pour tout juste motif, notamment, un changement dans les circonstances.

- Le moment opportun pour octroyer le paiement provisoire de dommages-intérêts est la clôture des plaidoiries.

KASKWAPANKTUEMK DAMIJL

SUMMARY*

Kourt Kisut mimajuinul (plaintiff) apankituksilin suliewey (damages) ujit tan teli opla'l+sipnn kt+kl mimajuinul (the defendant). Miamuj nikani apankitkl (special damages) defendant ujit tan teli ks+ka'taj (plaintiff) msit koqowey, m+ta mu nuku pe'kwataq aq mu kis lukwek. General damages awarde'walujl (plaintiff) mita mu nuku tali wtapsunik kis natal lukwen wula wsitqamu'k. General damages nespiw apankitkl tan koqoweyek kpkwatusoq (plaintiff) L'pa na kisi lukwej. Plaintiff tan tli msenss damijl miamuj kourtiktuk elalatl (court action) defendantal. Kourtiktuk wji sutasitew defendant legally kisna layaple'win aq miamuj apankituan plaintiffal. Apjiw pas+k kourt awardewatekek kisi trial-ik, aqq we'ju'j defendant liaplewit, aqq tan tujiw kisi ila'matultimk tan tla'sitew koqowey. Kourt kisi nise'kess tan tel awtik suliewey wen mesnik, kourt iloqapt+k plaintiffal nespi tla'lsilin (contributory negligence) tan teli ktpie'lij aw kourtiktuk tl'tek, kourt kisi tmasqate'ss damijl (damages) plaintiff amsami ktu oqomasij.

Kourt ika'lsit aq miamuj telsutk defendant amuj kaskwapankituatl plaintiffel ke'sk mu trialinuk. 1996ek, amendmensl ika'tasik+pnn Nopa Sko'sia Civil Procedure Rules-iktuk, tan mesqnn wikasik tli msikesitesk. Amendmensl asite'tkip kaskwapankituksin plaintiff, tan tujiw defendant kis tlu'ej tela'lsip, aq kourt nejpa ki's kejiatl tela'silitl.

Personal injury actions-ituk, tan plaintiff kwilut suliewey ujit tan teli ajkne'k, kisi msentew suliewey pasik defendant insurance pma'toq, kisna public authoritie'wij, kisna tepi wsulieweymij kisi kaskwapankitmin.

Eykk wen teli tlamsitasit, na la law (tplutaqn) ujit interim payment of damijl tepawtiss asite'tmin kaskwapankitaqn (interim payment) tlia' defendant me mu kjiju'sin nekm wtla'taqnin. Etli te'tmik me ateli'tiss plaintiffaq applye'wultijik msnminew interim payment. Aq eykk wen tluwetew mu fair-i-nuk.

Pnamujwiku's (January) 2000, Kmisn publishewatoqsip Discussion Paper, (mawoknutmamkewey wi'katikn), Interim Payment of Damages. (Kaskwapanktuemk Damijil.)

Kmisn etlite'tk kisi aji nqamasias interim payment of damijl ula Nopa Sko'sia, pas katu koqajalujik ki'tk plaintiffaq aq defendantaq.

Discussion paper proposewikip la ta'n ki'ss teltek, ap me tl'ten interim payment ujit damijil kisi msnmin ke'sk mu trialinuk, tan tet kouat tipi te'tk plaintiffal ks+pu'tuwelital. Aq nespiw Discussion Paper suggjestewa'toqsip ki'tk special aq general damijil ktqwatasin aq availaplewin interim paymentik-tuk, wula plaintiff mu nuta'wiss muska'tun tel litasuatk ujit tan

* Mi'kmaw translation by: Katherine Sorbey, Listuguj, Quebec

teli appli'ewij, aq tlia' tla'lsij mu naqaluksin kisi msnmin damijil, aq mu kinua'tuksin trial judge tan teli appliewilij interim paymentl, misoqo kaqi trial-ik aq kisutasik koqowey.

Kaqi ankaptasik msit koqowey wetmite'tasik Discussion- Paper-iktuk, Kmisn kisa'toq ula Final Report (Wtejkewey Report)

Ilsutaqnn ujit iljoqataqnn (Recommendations for reform)

- Nopa Sko'sia tplutaqn tan nujo'tk interim payment me kisi aja'tuness, asite'tmin interim payment tlia liability me mektasik, tplutaqn kisi iljo'qatuness asite'tmin interim payment tlia mekt+mik tanwen liablewit, nuta'tiss kourt satisfyewin plaintiff mate'tew kourt action triale'maj.

- Ujit wula'luksin kourt ula kontext tel meane'wik ula plaintiff amuj "kejitoq ks+putuetew aq ma mektuat"

- Nqamase'ktiss teli ew'm+k interim payment Rule, aq tepawtiss availaplewin msit tan civil proceedinn.

- Ki'tk special aq genera! damijil availaplewiss, ll'pa nuta'q ujit wiaqten interim paymentiktuk.

- Interim paymentey tplutaqn siawi applyewiss pe[illegible]i injury acktion-iktuk.

- Special aq general damijl asite'tasiss l'pa relevantewik, ujit wiaqten ula interim payment.

- Interim paymentey tplutaqn mu nuta'tnus plaintiff miamuj muska'tn tel nuta'jj.

- Plaintiff ami tla'lsit teli ktpiej, mu tepawtinus naqaluksin kisi msnmin interim payment, katu mikwite'tmines tan tujiw kourtiktuk ika'j.

- Mitigation ujit damijl wiaqtes kourt ankapt+min tan tijiw ilut tan tla'wtitew interim payment.

- Interimey paymentey tplutaqn mu wiaqtenus specific formulas tan tla'wtitew payment.

- Interimey paymentey tplutaqn pasik confinewa'tasis tan defendant keju't tepnmat sulieway kis apankitmin interim payment.

- Wekaw kisi wja'tuaj interim payment defendantal, plaintiff miamuj satisfyewatoq kourt ks+putuatal trialiktuk defendantal.

- L'pa na interimey paymentey tplutaqn ankua'timk ujit wiaqten situe'tion tan liability mektasik, na information ujit application wjimsnmin interim payment, mu apjiw nimituis trial judge misoqo kisi iknmuetoq wjugementim.

- Kourts ku'knmitiss kisi mina'tunew restrictionsl tan tel neatutij teliaq+p ujit interim paymentl.

- Kisi trialik aq judgement eliaq plaintiffewiktuk, kourt maw kijjass tan tel tepawtik interim paymensl ki'ss apankitkl defendant, aq nuta'q, miamuj plaintiff apaji apankituan defendantal, mu kis nutanuk tplutaqn ika'lsin tan tel settle-ewa'tutij.

- Tl'tess possiplewin ujit kourt awardewatun damijil tan pemawtikl aq maw tel tepawtik trial.

- Kourt tepawtiss kisi asite'tmin tan tijiw piltua'sik koqowey, ula interim payment pilua'sitn.

- Tan wen ketu applie'wij interim payment miamuj eskmat wekaw wikatiknn kaqi maliaptimitij tanik claim eltutij aq tanik matnmi'tij na wijey claim.

I INTRODUCTION

1. The project

Damages are sums of money, awarded by a court to compensate a person for loss or harm resulting from someone else's wrong.[1] A person seeking damages in the courts is the *plaintiff*, the person against whom the plaintiff's claim is made is the *defendant*, and the court proceeding by which the plaintiff makes his or her claim is an *action*. The plaintiff and defendant are often known as the *parties* to an action. If the court determines that the defendant's wrong has resulted in the plaintiff suffering loss or harm, then the defendant is deemed legally responsible or *liable* to compensate the plaintiff. A court *order* will be issued, requiring the defendant to pay the plaintiff a specific sum as damages.

Ordinarily, damages are only awarded by a court at the end of a trial, if a defendant has been found liable, after all outstanding issues between the parties have been resolved. The *interim payment of damages* involves a court ordering the defendant to pay a portion of damages to the plaintiff before trial. Interim payment of damages is often associated with *personal injury actions*, in which a plaintiff seeks compensation for bodily or physical injuries. A plaintiff who has suffered personal injuries may not be able to work and may therefore have difficulty paying for medical treatment and other expenses in the period before trial. Interim payment of damages is not, however, confined to personal injury actions.

In Nova Scotia, the *Civil Procedure Rules* govern how actions are commenced and how they proceed.[2] The topic of interim payment of damages was first suggested to the Commission in 1992, by a practising lawyer of the view that a new Rule should be created, in order to allow an application to be made for interim payment of damages when a defendant's liability is not an issue. In November 1996, Rule 33 was amended to allow interim payment of damages in cases where a court is satisfied that the defendant has admitted liability, or the defendant's liability has been determined by the court. If a personal injury action is involved, interim payment of damages is only available where the defendant is covered by insurance, is a public authority, or has adequate financial resources with which to make an interim payment.

In 1997, a practising lawyer contacted the Commission, to express the concern that the amendment of Rule 33, though desirable, had not gone far enough. In 1999, Commission staff spoke informally with a number of lawyers and insurance company representatives with particular knowledge about application of the rule pertaining to interim payment of damages. Opinions about the amended Rule 33 were mixed. Some people, in particular lawyers who

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[1] See J. Munkman, *Damages for Personal Injuries and Death*, 9th ed. (London: Butterworths, 1993) at 1; D. A. Dukelow & B. Nuse, *The Dictionary of Canadian Law* (Scarborough: Carswell, 1991) at 250.

[2] The *Civil Procedure Rules* are court rules made by the judges of the Nova Scotia Court of Appeal and the Supreme Court of Nova Scotia under authority of the *Judicature Act*, R.S.N.S. 1989, c. 240, ss. 2(h), 46-51.

represent personal injury plaintiffs, were of the view that Rule 33 should be further changed, to permit interim payment of damages when liability has not yet been established. This change, they maintained, would enable considerably more plaintiffs to apply for interim payment in the period before trial. Other people, however, considered that the current form of Rule 33 was satisfactory, as it restricts the interim payment of damages to cases where liability is clear. These people were concerned that to allow for interim payment when liability is still in question could be unfair to defendants.

As a result of the differing viewpoints on the interim payment of damages, the Commission decided to issue a Discussion Paper, which was published in January 2000. The Commission received a number of comments on the Discussion Paper or on Rule 33. A list of those persons who commented is provided at Appendix D. The Commission is grateful to the commentators for their remarks.

For the most part, those commentators who supported an additional change to Rule 33 suggested that the current rule is unsatisfactory, as it allows defendants to deny liability, in the hope that the delay before trial will make a plaintiff who lacks funds amenable to settlement. It was suggested that in particular, personal injury plaintiffs, whose injuries prevent them from working, suffer financial hardship in the period between the time of their injury and the time of settlement or trial judgment. These commentators also tended to agree that summary judgment, one of two potential means of establishing a defendant's liability before trial, in order to take advantage of the current interim payment rule, is generally too difficult for a plaintiff to obtain. In addition, the position was taken that as the legal representation of defendants in motor vehicle cases tends to be well-funded by insurers, plaintiffs should also have access to adequate funding in the pre-trial period.

Commentators who disagreed with the need to alter Rule 33 suggested that the proposed changes would be unfair, as they could undermine a defendant's right to a fair trial, in that some issues might be decided without the benefit of all available evidence. These commentators were also concerned that an interim payment award might cause a defendant to suffer financial hardship in the period before settlement or trial. Moreover, it was suggested that a plaintiff who had benefitted from an interim payment, yet who received nothing at trial, or an award which was lower than the amount of the interim payment, may not be able to repay any amounts owing after the trial judgment. It was also suggested that the changes set out in the Discussion Paper would result in civil actions being more costly and time-consuming. An additional point made was that as the interim payment rule has only been in place since 1996, it is too early to consider changing the rule.

Having taken into account all comments received, and where appropriate, having completed additional research, the Commission has prepared this Final Report.

2. Legal language

This Final Report attempts to present legal information as clearly as possible so that people who do not have legal training can understand and comment on the Commission's suggestions for reform. There are still some situations where the language relates to specific legal concepts, and the words used will not be familiar to everyone. This section provides definitions of those words as they are used in this Final Report.

Action - The court proceeding by which a plaintiff makes a claim for damages.

Affidavit - A written statement, supported by the oath or solemn affirmation of the person making the statement.

Application - The pre-trial procedure by which a plaintiff seeks summary judgment. Also referred to as a motion.

Civil Procedure Rules - Court rules which govern how actions in Nova Scotia are commenced and how they proceed.

Common law - The law contained in court decisions rather than in legislation.

Contributory negligence - The extent, if any, to which a plaintiff caused his or her injury and therefore the amount of damages suffered.

Counter-claim - A claim by a defendant that he or she is entitled to a sum from the plaintiff in the same matter concerning which the plaintiff has brought an action.

Cross-claim - A claim made by a defendant against another defendant in the same action.

Damages - Sum of money, awarded by a court to compensate a person for loss or harm resulting from the wrong of another person.

Defendant - The person against whom a plaintiff's claim is made.

Discovery - Pre-trial disclosure of information and documents by the parties to an action.

Estate	-	Everything that a person owns at the time of his or her death.
General damages	-	Compensation to a plaintiff for the intangible results of a defendant's wrong, such as pain and suffering, mental distress and loss of quality of life. General damages can also include a claim for future lost earnings and for future loss of earning capacity.
Interim payment of damages	-	Payment of a portion of a plaintiff's damages in the period before trial.
Legislation	-	Law made by elected members of government.
Liability	-	Finding by a court that a defendant is legally responsible to compensate the plaintiff.
Mitigation	-	The obligation of plaintiffs to take reasonable steps to minimize their damages.
Motion	-	See definition for application.
Order	-	Document issued by a court, requiring a defendant to pay the plaintiff a specific sum as damages.
Parties	-	The plaintiffs and defendants involved in an action.
Personal injury action	-	An action in which a plaintiff seeks compensation for bodily or physical injury.
Plaintiff	-	A person seeking damages in the courts.
Pleadings	-	Documents, filed with the court, which set out the parties' positions on the issues in dispute.
Section B benefits	-	Mandatory benefits paid in the event of injury or death from a motor vehicle accident.
Set off	-	Application of an amount, owed to a defendant from an unrelated matter, to reduce an award in a proceeding before a court.

Special damages	-	Compensation to a plaintiff for pre-trial financial losses or expenditures which result from a defendant's wrong. Special damages can be objectively identified and assigned a precise monetary value.
Standard of proof	-	In relation to interim payment of damages, this refers to how satisfied a court must be that the plaintiff will succeed at trial.
Summary judgment	-	Determining liability through a court judgment in the period before trial.
Wrongful death action	-	Where a person is killed as a result of someone else's wrong, an action by the dependants of the deceased to seek compensation for the value of lost financial and emotional support.

II GENERAL INFORMATION

1. What is an interim payment of damages?

At *common law*,[3] damages in an action can only be determined "once and for all." Courts have no power at common law to award damages before trial.[4] A plaintiff's entitlement to damages would therefore date from the time of trial judgment, if the defendant was found liable, when all outstanding issues between the parties to an action would be decided. The common law has been changed in a number of jurisdictions, including Nova Scotia,[5] to permit a plaintiff to recover before trial a certain proportion of damages claimed, known as an interim payment of damages,[6] even though the court has yet to decide all issues in dispute.

2. What are the perceived benefits of interim payment of damages?

This Final Report concerns court-ordered interim payment of damages.[7] The Winn Committee, which examined this issue for the United Kingdom Parliament, identified a number of benefits that could result from court-ordered interim payment of damages.[8] It has been suggested that court-ordered interim payment of damages may accelerate settlement between the parties to an action. A defendant who is required to pay a portion of damages may choose

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[3] Common law is the law contained in court decisions rather than in *legislation*. Legislation is law made by elected members of government.

[4] Western Australia Law Reform Committee, *Interim Payments in Personal Injury Claims* (Project 5) (Perth, W.A.: Western Australia Law Reform Committee, 1979) [hereinafter Western Australia Report] at 6.

[5] Nova Scotia, *Civil Procedure Rules*, r. 33.01(A)(1) [hereinafter Nova Scotia rule]; Bermuda, *Law Reform (Miscellaneous Provisions) (No. 2) Act 1977* (no. 52 of 1977) [hereinafter Bermuda rule], as reported in (1978) 4 Commonwealth Law Bulletin 538; England & Wales, *Civil Procedure Rules 1998*, rr. 25.6-25.9 [hereinafter English rule]; New Brunswick, *Rules of Court*, r. 47.03(3) [hereinafter New Brunswick rule]; *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 265.6 [hereinafter N.B. *Insurance Act*]; New South Wales, *Supreme Court Act 1970*, s. 70E [hereinafter N.S.W. rule]; Scotland, *Rules of the Court of Session 1994*, rr. 43.8-43.10 [hereinafter Scottish rule]; South Australia, *Supreme Court Act 1930*, s. 30B [hereinafter South Australia rule].

[6] Interim payment of damages is also sometimes known as advance payment of damages.

[7] Court-ordered interim payment is distinct from *Section B benefits* provided by authority of Schedule B to Part IV of the *Insurance Act*, R.S.N.S. 1989, c. 231. Section B benefits are mandatory benefits provided to people who sustain bodily injury or death arising from the operation or use of an insured automobile. These benefits are paid by the vehicle's insurer to compensate for such aspects as medical expenses, rehabilitation costs, and lost employment income attributable to a motor vehicle accident. The benefits available for medical and related expenses are limited to $25,000. The amount of section B benefits payable for lost employment income is the lesser of $140 per week or 80% of a person's gross weekly income from employment. Ordinarily, benefits for lost income do not last more than 104 weeks. Section B benefits may not be adequate to meet all of a plaintiff's financial needs.

[8] U.K., *Report of the Committee on Personal Injury Litigation* (London: HMSO, 1968) (Chairman: R. Winn) [hereinafter Winn Report] at 32. A defendant is also free to make voluntary payments to a plaintiff in the period before trial.

to bring an earlier end to legal proceedings, by electing to pay all damages at once. Earlier court involvement in a dispute may speed up any ultimate resolution of the issues between the parties. The existence of an interim payment procedure may also encourage more out-of-court negotiations between parties. In addition, it has been suggested that the availability of interim payment may strengthen a plaintiff's bargaining position, thereby providing for more equality between the parties in situations where the plaintiff has little money, but the defendant has considerable financial resources. The most often suggested benefit of interim payment is that it can lessen financial hardship suffered in the pre-trial period by a plaintiff, whose income has declined or been reduced to nothing because of the defendant's wrongful act. In the period before trial, a plaintiff may incur significant expenses for such items as medical care, travel, and personal assistance. The period between the time of an injury and court judgment may be lengthy. A considerable time, for example, might elapse before the full effects of a medical condition resulting from an injury are known. Completing pre-trial procedures such as *discovery* also takes time.[9] Without the benefit of interim payment of damages, plaintiffs may decide that they cannot afford to wait for an action to proceed to trial. Such plaintiffs might therefore accept a settlement offer which is lower than the amount of damages they might have obtained at trial.[10]

3. What are the concerns about interim payment of damages?

One of the concerns raised about interim payment of damages is that it could be used to finance litigation by paying lawyers' fees rather than meeting a plaintiff's basic economic needs. It has also been suggested that the availability of interim payment can result in overpayment, which a plaintiff may not be able to pay back to the defendant after trial.[11] Most importantly, if available even though the defendant's liability has not been established, interim payment may result in the balance of power between the parties shifting too much in the plaintiff's favour. For example, an uninsured defendant may not be able to gather sufficient funds with which to pay an interim award. Such a defendant could suffer the same inability to continue with litigation, because of a lack of finances, which interim payment is meant to remedy for plaintiffs.[12]

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[9] Discovery involves pre-trial disclosure of information and documents by the parties to an action: Dukelow & Nuse, note 1, above, at 288. Discovery helps the parties to gauge the strength of their respective positions and can help to promote a settlement before trial.

[10] The Manitoba Law Reform Commission suggested that the dual effect of loss or reduction of employment income, combined with added expenses, following a defendant's wrongful act, could have "catastrophic consequences" for an injured person: Manitoba Law Reform Commission, *Interim Payment of Damages* (Report 87) (Winnipeg: The Commission, 1995) [hereinafter Manitoba Report] at 3.

[11] Manitoba Report, note 10, above, at 6.

[12] Note 10, above, at 6-7.

4. Is interim payment of damages available in Nova Scotia?

Since 1996, the Nova Scotia *Civil Procedure Rules* have provided for the interim payment of damages. This can occur as a result of the defendant admitting liability for the plaintiff's damages or as a consequence of the court deciding the defendant is liable for the plaintiff's damages, with damages remaining to be assessed.[13] Where an action for personal injuries is involved, the defendant must have insurance to cover the plaintiff's claim, must be a public authority, or must be a person financially able to make an interim payment. In any event, interim payments are not mandatory, but are subject to the court's discretion.[14] The relevant rule, 33.01(A)(1) ("the Nova Scotia rule"), reads as follows:

Interim payment

33.01(A)(1) *Notwithstanding the provisions of rule 33.01, the court may order the defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set off, cross-claim or counter-claim on which the defendant may be entitled to rely, if the court is satisfied:*

(a) that the defendant against whom the order is sought has admitted liability for the plaintiff's damages, or

(b) the plaintiff has obtained judgment against the defendant for damages to be assessed.

(2) No order shall be made under subsection (1) in an action for personal injuries if it appears to the court that the defendant is not a person falling within one of the following categories:

(a) a person who is a party to a contract of insurance pursuant to which the insurer is obliged to contribute or to indemnify the plaintiff in the event that the defendant is found liable to the plaintiff,

(b) a public authority, or

(c) a person whose means and resources are such as to enable the person to make the interim payments. *[Amend. 29/11/96]*

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[13] *Hall* v. *Woodland* (1997), 164 N.S.R. (2d) 149 at 152 (S.C.), aff'd (1998), 165 N.S.R. (2d) 78 (C.A.) [hereinafter *Hall*].

[14] *Bogaczewicz* v. *Faulkner* (1997), 181 N.S.R. (2d) 163 (S.C.) [hereinafter *Bogaczewicz*].

5. Is there a need to establish a defendant's liability?

For an interim payment of damages to be ordered in accordance with the Nova Scotia rule, a defendant's liability for the plaintiff's damages must first be established, either through an admission or as a result of a court judgment. In *Armoyan Group v. Dartmouth (City)*,[15] the court considered how a defendant's liability could be established through an admission. The court required, "a clear admission of facts in the face of which it would be impossible for the party making it to succeed."[16] The court also held that "admissions of liability under Rule 33.01(A)(1) are not limited to admissions in pleadings or in open court."[17] Other potential sources of admissions, though not mentioned in *Armoyan*, would include evidence in a defendant's *affidavit*,[18] answers given to questions posed as part of the discovery process,[19] and correspondence arising either before or after the action was commenced.[20]

Liability can also be determined by a court. In the period before trial, this determination takes the form of a *summary judgment*. The pre-trial procedure by which a plaintiff seeks summary judgment is known as an *application*, which in some jurisdictions is called a *motion*. A plaintiff who applies for summary judgment in essence argues that the defendant has no real defence to the claim being made, and that the only issue remaining for the court to decide is the amount of damages. The plaintiff therefore seeks a judgment against the defendant for damages to be assessed. By virtue of Rule 13, which governs summary judgment in Nova Scotia, once the plaintiff has clearly established a claim, the defendant must then be able "to set up a bona fide defence or raise an arguable issue to be tried...."[21] A mere assertion that a defence is available is not enough. Rather, in order to avoid summary judgment, the defendant must reveal the nature of his or her defence and must disclose such facts which will be sufficient to support the defence or a fairly arguable point.[22] The defendant's burden is not

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[15] (1998), 167 N.S.R. (2d) 398 (C.A.) [hereinafter *Armoyan*].

[16] Note 15, above, at 399, citing *Bank of Nova Scotia* v. *Dombrowski* (1977), 23 N.S.R. (2d) 532 at 537 -538 (S.C.A.D.).

[17] Note 15, above, at 399. In an action, the *pleadings*, documents which are filed with the court, set out the parties' positions on the issues in dispute: see Dukelow & Nuse, note 1, above, at 725.

[18] *MacNeil* v. *Black* (1998), 166 N.S.R. (2d) 127 at 128-129 (C.A.) [hereinafter *MacNeil*]. An affidavit is a written statement, supported by the oath or solemn affirmation of the person making the statement: Dukelow & Nuse, note 1, above, at 25.

[19] Manitoba Report, note 10, above, at 18, n. 19.

[20] R. F. Wagner, "Interim Payments from the Section A Insurer" (Paper presented to the Canadian Bar Association, Nova Scotia Branch, 16 April 1999) [unpublished] at 3.

[21] *Canadian Imperial Bank of Commerce* v. *Tench* (1991), 97 N.S.R. (2d) 325 at 327 (S.C.A.D.).

[22] *Hall*, note 13, above, at 150-151.

considered to be a heavy one,[23] which means that in practice plaintiffs do not often obtain summary judgment.

6. How have Nova Scotia courts treated the issue of interim payment of damages?

There have not been many reported court decisions in Nova Scotia relating to interim payment of damages. In *Hall* v. *Woodland,*[24] it was held that an application for summary judgment had been properly dismissed, so no liability had been established, and consequently no interim payment was to be made. In *Armoyan,*[25] it was found there had been no admission of liability, and thus no interim payment was allowable. In a third case, *MacNeil* v. *Black*,[26] a personal injury action arising from a motor vehicle accident, the Court of Appeal held that the application for summary judgment had been improperly dismissed and awarded $20,000 to the plaintiff as an interim payment without prejudice to the plaintiff's right to reapply. No further remarks were made about interim payments. In a fourth case, *Bogaczewicz* v. *Faulkner*,[27] also a personal injury action which followed an automobile accident, the Nova Scotia Supreme Court awarded $18,000 as an interim payment to the plaintiff, who had sought an interim payment of $45,000.

A motor vehicle collision also led to the decision in *MacDonald* v. *MacPherson*,[28] where summary judgment was allowed, but no interim payment was granted to the plaintiff. The court in *MacDonald*, which only had affidavit evidence to consider, held that determining the amount of an interim payment in the circumstances would be no more than a haphazard guess, because of issues raised about the plaintiff's claim for lost income and about the plaintiff's credibility. It was considered more appropriate for these issues to be left to the trial court, which could make both findings of fact and of credibility with the benefit of oral testimony by witnesses.

Mahoney v. *Amleco Leasing Ltd*,[29] the most recent Nova Scotia case involving interim payment of damages, involved a claim arising from a motor vehicle accident. The defendants had made a voluntary, without prejudice, interim payment of $20,000 to the plaintiff. The defendants had also admitted liability for the collision, but not for the plaintiff's damages. The plaintiff sought an interim payment of $250,000. The court confirmed a number of details which had

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[23] *Oceanus Marine Inc.* v. *Saunders* (1996), 153 N.S.R. (2d) 267 at 270 (C.A.); *MacNeil*, note 18, above.

[24] Note 13, above.

[25] Note 15, above.

[26] Note 18, above.

[27] Note 14, above.

[28] (June 16, 1999), S.H. 146076 (N.S.S.C.), aff'd (December 7, 1999) C.A. 157445 (N.S.C.A.).

[29] (1999), 180 N.S.R. (2d) 164 (S.C.) [hereinafter *Mahoney*].

been articulated in *Bogaczewicz* about the interim payment rule and also provided some additional commentary. In particular, the court held that the fact a defendant denies liability for the plaintiff's damages will not necessarily defeat an interim payment application, as a defendant does not have an absolute power to bar a plaintiff's application. Rather, it remains open to a plaintiff to establish, on the basis of all available evidence, and in particular, the conduct and evidence relied upon by the defendant, to the court's satisfaction that the defendant admitted liability for all or a portion of the plaintiff's damages.[30] In choosing not to award an interim payment, the court held that the evidence did not establish an admission of liability to any portion of the plaintiff's damages beyond what would likely be covered by the voluntary payment already made.[31]

Aspects of these Nova Scotia decisions involving interim payment of damages are mentioned below, where appropriate. In the remainder of this Final Report, the Commission examines the nature of interim payment of damages in more detail and recommends how the relevant law in Nova Scotia can be clarified and made more effective.

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[30] *Mahoney*, note 29, above, at 168.

[31] Note 29, above, at 172.

III RECOMMENDATIONS FOR REFORM

1. Should interim payment of damages be available if liability has not yet been established?

The Nova Scotia rule permits interim payment of damages only where a defendant has admitted liability or liability has been established by a court. A similar rule applies in New Brunswick,[32] the only other Canadian jurisdiction which provides for interim payment, as well as in South Australia,[33] and Bermuda.[34] It was also recommended by the Winn Committee, which studied this issue in England,[35] as well as by the New South Wales Law Reform Commission.[36]

In some jurisdictions, interim payment is available even though liability is still in question, where a court is of the view that the plaintiff will succeed at trial. The fact that a court order is made, despite liability still being in question, has no bearing, however, on the issue of the defendant's liability, which will be decided by the trial judge. In England, seemingly the first jurisdiction to provide for court-ordered interim payment of damages,[37] an order for interim payment can be made where the court is "satisfied" that "if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment."[38] Similar language is used in legislation in New South Wales.[39] The Law Reform Committee of the Parliament of Victoria in Australia has expressed support for the rule used in New South Wales, in the

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[32] The New Brunswick rule, note 5, above, states: "Where liability is established before damages are assessed, the court may direct advance payments of special damages and, for the purpose of giving such directions, may receive such preliminary evidence as it considers necessary."

[33] South Australia rule, note 5, above, s. 30B(2).

[34] Bermuda rule, note 5, above.

[35] Winn Report, note 8, above, at 35.

[36] New South Wales Law Reform Commission, *Working Paper on Deferred Assessment of Damages for Personal Injuries and Interim Payments During the Period of Postponement of Assessment and on the Relevance of Remarriage or Prospects of Remarriage in an Action Under Lord Campbell's Act* (Sydney: Government Printer, 1969) [hereinafter N.S.W. Commission Working Paper] at 23.

[37] Interim payment, a response to recommendations in the Winn Report, note 8, above, was first made available in England in 1969: *Schott Kem Ltd.* v. *Bentley*, [1991] 1 Q.B. 61 at 69 (C.A.).

[38] English rule, note 5, above, r. 25.7(1). The full text of this rule is in Appendix B. The current English rule only came into effect in 1999 (see S.I. 1998/3132). An earlier version (England & Wales, *Rules of the Supreme Court*, Ord. 29, r. 11), which is similar in its significant details to the current one, served as the model for a number of interim payment rules in other jurisdictions.

[39] N.S.W. rule, note 5, above, s. 76E(3)(c).

context of claims involving personal injuries suffered through the use of health services.[40] A provision in Scotland allows for interim payment where the court is "satisfied" that the plaintiff "would succeed in the action on the question of liability without any substantial finding of contributory negligence on his part...."[41] A section in the New Brunswick *Insurance Act* enables a judge to make an interim payment order if "satisfied that the plaintiff will prove that the defendant is liable for those damages."[42]

The Manitoba Law Reform Commission suggested that to restrict the availability of interim payment of damages to situations where a defendant's liability has been admitted or determined would significantly reduce the number of plaintiffs who could benefit from a such a provision. On the other hand, the Manitoba Commission recognized that making interim payment too accessible might result in situations of overpayment, with a plaintiff being unable to repay the defendant after trial. It might also force certain defendants to give up legitimate defences because of their own financial hardship.[43] The Manitoba Commission concluded that an appropriate balance would be achieved by limiting interim payment orders to situations where a judge hearing an application "believes that the plaintiff will wholly succeed against the defendant at trial on the issue of liability."[44]

As shown above, those jurisdictions which allow interim payment of damages, even though liability is still in question, differ in their choice of language to describe what the plaintiff must be likely to achieve. A related issue involves the *standard of proof,* which refers to how satisfied the court must be that the plaintiff will succeed at trial. This is a question of degree. In criminal trials, the standard of proof is beyond a reasonable doubt. In civil (non-criminal) trials, a lower standard generally applies. It is often referred to as "on the balance of probabilities," meaning more probable than not.[45]

Courts in England seem to interpret the burden on a plaintiff seeking interim payment to be more than the civil standard, yet less than the criminal standard. In *Shearson Lehman Inc.* v. *Maclaine, Watson Ltd.*,[46] Lloyd, L.J. explained:

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[40] Parliament of Victoria, Australia, Law Reform Committee, *The Legal Liability of Health Service Providers* (Final Report) (Melbourne: Parliament of Victoria, 1997) online: http://www.Lawreform.org.au/hea/title.html (last updated: 97/5/17) [hereinafter Parliament of Victoria report] para. 7.40.

[41] Scottish rule, note 5, above, r. 43.9(3)(b).

[42] N.B. *Insurance Act*, note 5, above, s. 265.6(2). The full text of this section is in Appendix C.

[43] Manitoba Report, note 10, above, at 8-9.

[44] Note 10, above, at 9.

[45] J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 141-143.

[46] [1987] 1 W.L.R. 480 at 489 (C.A.). The English cases cited in this Report all involve the pre-1999 version of the English rule. As the current and pre-1999 versions are quite similar in their significant details, in

> *Something more than a prima facie case is clearly required; but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden. This involves no lasting hardship on the defendant since there is a provision for readjustment at the trial in case of an overpayment.*

This decision was followed in *Ricci Burns Ltd.* v. *Toole*,[47] where Ralph Gibson, L.J. noted:

> *The standard of proof on the probabilities is high but it is not necessary to exclude every possibility of failure because the order for interim payment may be reversed at trial.*

In turn, Ralph Gibson, L. J. was following the reasoning given by May, L.J. in the case of *Gibbons* v. *Wall*,[48] where further explanation of the burden of proof in cases involving interim payments was provided:

> *[T]he civil burden of proof...is a flexible test...and it depends upon the nature of that which has to be proved where on the flexible scale of the balance of probabilities one has to pitch the burden...in the context of an application for an interim payment...the burden is a high one within that standard if only because litigation of its nature involves no certainties. A plaintiff with what may appear on paper to be a strong case may find it fail at trial. If he does then he will have to repay the whole or to the extent that he fails, part of the interim payment. But...the plaintiff may spend it....If he does it may be difficult...to recover if he fails ultimately at trial. Clearly the burden resting upon an applicant in those circumstances is towards the top of the flexible scale.*

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particular the provisions allowing interim payment when liability has yet to be established, one would not expect any future interpretation of the rule to differ markedly. On at least one occasion, a court in New South Wales has used the standard of proof applied to the pre-1999 English rule: see comments about *Frellsen* v. *Crosswood Pty. Ltd.* (1992), 15 M.V.R. 343 (N.S.W.S.C.), in New South Wales Law Reform Commission, *Provisional Damages* (Report 78) (Sydney: New South Wales Law Reform Commission, 1996) [hereinafter *Provisional Damages*] at 25-26.

[47] [1989] 1 W.L.R. 993 at 1004 (C.A.) [hereinafter *Ricci*].

[48] (12 February 1988), (C.A.) [unreported], cited in *Ricci*, note 47, above, at 1002-1003.

In Scotland, the relevant rule requires a court to be "satisfied" that a plaintiff "would succeed in the action on the question of liability...."[49] In *Cowie* v. *Atlantic Drilling Co. Ltd.*,[50] the court considered how "satisfied" in this context has been interpreted by Scottish courts. The leading test, *Cowie* explained, interpreted "satisfied" to mean that a plaintiff was "practically certain" to succeed, or "would almost certainly do so."[51] In other words, the standard was "something less than complete certainty, but more than probability or even high probability."[52] As identified in *Cowie*, the leading test has been modified somewhat, now being whether the court is of the opinion that the plaintiff "would almost certainly succeed on the question of liability at least to some extent."[53]

Although the number of reported decisions on this issue is limited, the relevant standard in New Brunswick seems to be lower than that applied in England or Scotland. In *Roy* v. *St. Pierre*,[54] which concerned interim payment of damages in the context of the New Brunswick *Insurance Act*,[55] the New Brunswick Court of Queen's Bench seemed to apply a lower standard than those used in England or Scotland. In allowing for an interim payment of $15,000 in a personal injury action which followed an automobile accident, Deschênes, J. stated his satisfaction "in terms of probabilities that the defendant [would] be held liable for the accident...," and that it was "more likely than not the plaintiff [would] be entitled to recover damages...." as a result of the accident.[56] Deschênes, J. added that interim payment was awarded "on the basis of probabilities."[57] In *Bell* v. *Capson*,[58] in terms of the standard of proof to apply, Rideout, J. indicated:[59]

> *...the burden of proof should be less than at trial but sufficient for the court to make a decision. Each case will have to be determined on its own facts and evidence.*

In the Discussion Paper, this Commission noted that a major justification for interim payment of damages was to help lessen the financial needs of plaintiffs in the period before trial.

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[49] Scottish rule, note 5, above.

[50] [1995] S.L.T. 1151 (Ct. Sess.) [hereinafter *Cowie*].

[51] Note 50, above, at 1154.

[52] Note 50, above, at 1154.

[53] Note 50, above, at 1154. See also *Cleland* v. *Campbell*, (1998) S.L.T. 642 at 643 (Ct. Sess.).

[54] (1999), 208 N.B.R. (2d) 92 (Q.B.) [hereinafter *Roy*].

[55] Note 5, above.

[56] Note 54, above, at 96-97.

[57] Note 54, above, at 97.

[58] (2000), 17 C.C.L.I. (3d) 276 (N.B.Q.B.).

[59] Note 58, above, at 280.

Keeping this justification in mind, the Commission took the view that to restrict interim payment to situations where liability has been established might deprive a significant number of plaintiffs from access to interim payment. Under the current rule, a plaintiff must establish the defendant's liability for damages, either through an admission or through summary judgment. It was suggested that defendants may choose not to admit liability, either for tactical reasons or because they truly believe they are not responsible for a plaintiff's injury. Plaintiffs do not often succeed in applications for summary judgment, the Discussion Paper suggested, as the standard to be met by defendants is not a difficult one. The Commission took the position that the interim payment rule, which in its current form requires liability to be established, was too restrictive.

On the other hand, the Commission did not wish to make interim payment of damages too accessible, so that unwarranted applications for interim payment would be made. The issue of overpayment was also mentioned. As an example, the Discussion Paper suggested that if a judge who allows an application for interim payment is found later to be wrong at trial, yet the plaintiff spends the money in the meantime, the defendant may not be able to recover the amount of the interim payment. It also makes little sense, the Discussion Paper suggested, to redress a perceived imbalance by imposing upon defendants a financial burden that is as difficult as the one interim payment is meant to remedy for plaintiffs. An unduly high interim payment might prevent a defendant from continuing with litigation in the same way as financial need could compel a plaintiff to settle or to discontinue an action.

In the Discussion Paper, the Commission took the position that the Nova Scotia rule should be expanded, to allow for interim payment of damages where liability is still in question. The Commission suggested that the rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial. The Discussion Paper did not take a position on the question of the standard of proof. Instead, it asked for comments on that issue.

a. Expansion of the rule

Not surprisingly, as the most significant part of the Discussion Paper, the issue of whether to expand the interim payment rule generated the most commentary. In general, commentators who favoured an expansion of the rule suggested that the existing rule does not work well, as it encourages defendants to avoid having to make an interim payment simply by refusing to acknowledge liability. These commentators also tended to be of the view that it was not difficult for defendants to avoid summary judgment. Some defendants, it was suggested, reason that without the benefit of an interim payment, a plaintiff, because of financial hardship, may become more amenable to settlement in the period before trial. A plaintiff might therefore accept a settlement amount which is less than what he or she could have been awarded at trial. It was also suggested that a plaintiff is almost always at a serious disadvantage in a personal injury case in relation to the defendants, as the defendants are

almost universally covered by insurance, and insurance organizations have sufficient funds to hire lawyers to defend against claims.

Other commentators took the position that to expand the rule would be both unfair and of dubious merit. They questioned whether plaintiffs were actually suffering financial difficulty in the period before settlement or trial. It was also suggested that in any event, the potential hardship of plaintiffs would be no greater than that of possible difficulty for defendants who would have to pay out money even though their liability has yet to be established. Some commentators suggested that to alter the rule as suggested by the Commission could erode a defendant's right to a fair trial, in that a party defending an action might have his or her rights, either in terms of liability or damages, prematurely judged prior to the availability of all evidence. Only at trial would all evidence, including evidence which defendants might wish to conceal until then for tactical reasons, be presented. It was also suggested that it would not be fair to compel the payment of money which may not be held payable at trial, and which may not be recoverable from a plaintiff after trial. Moreover, commentators who disagreed with expanding the rule suggested that the proposed rule change could lead to lengthy and complex applications, thereby increasing the costs of conducting civil actions and unduly delaying any ultimate resolution at trial of all the issues between the parties.

Having taken into account the comments received, the Commission is of the view that some plaintiffs legitimately experience financial hardship in the period before settlement or trial, and that this difficulty is attributable to the results of wrongful acts by defendants. The Commission is concerned that the current version of the interim payment rule, which requires establishment of liability on the part of defendants, can prove inadequate for certain plaintiffs. Unless a defendant is willing to admit liability for the plaintiff's damages, the current interim payment rule requires plaintiffs to rely on summary judgment applications. It does not take much, however, to defeat a summary judgment application. In any event, as shown by the result in the *Macdonald* decision,[60] obtaining summary judgment is not a guarantee that an interim payment will be awarded. Some defendants might be encouraged by the wording of the current interim payment rule to rely on questionable defences in order to prevent summary judgment and ultimately an interim payment award. In the period before trial, financial difficulty might compel a plaintiff to settle for a lower amount than he or she may have received at trial. An expanded interim payment rule, one which allows the possibility of a payment where a defendant's liability has not been established, would discourage certain defendants from relying on dubious defences. On the other hand, not every plaintiff would qualify. Rather, it would have to be a plaintiff with a strong case, a plaintiff who was able to satisfy the court that he or she is likely to succeed at trial. The Commission affirms its position, taken in the Discussion Paper, that the interim payment of damages rule should be expanded, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.

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[60] Note 28, above.

Pre-trial applications, such as those involving interim payment of damages, are meant to be resolved in a speedy fashion. They take place on the basis of limited evidence, generally in affidavit form alone, without any oral testimony. As acknowledged by the Supreme Court of Nova Scotia in *Mahoney*, a pre-trial application is "not a substitute for the trial nor is it a mini-trial."[61] In particular, at the pre-trial stage, judges will not consider issues of credibility.[62] Rather, credibility matters are left for the trial judge, who will have access to all the evidence, and who will be able to observe witnesses as they testify. As a result, some disputes, particularly those which will involve determining the credibility of witnesses, can only be resolved at trial. Although suggesting an expansion of the interim payment of damages rule, the Commission acknowledges that the facts in dispute in some situations will prove too complex to resolve at the pre-trial stage. Nonetheless, the Commission does not consider this a sufficiently strong reason to justify not expanding the interim payment rule.

b. Standard of proof

In the Discussion Paper, the Commission did not take a position on what relevant standard of proof would be appropriate for an expanded interim payment rule. Some commentators, nonetheless, thought the Discussion Paper supported the award of an interim payment where a court was satisfied only on the balance of probabilities that the plaintiff would succeed at trial. They described the Discussion Paper's selection of English case law as "curious." It seemed to be suggested in particular that one decision (*Ricci*),[63] mentioned in the Discussion Paper, had fallen into disfavour. Those commentators who addressed this issue preferred the reasoning in another case, *British and Commonwealth Holdings plc* v. *Quadrex Holdings Inc.*[64]

In terms of the principle it was used to illustrate, namely the standard of proof applied under the English interim payment rule, the Commission is not aware of the *Ricci* decision having fallen into disfavour. Rather, the relevant standard, as set out in *Ricci*, is confirmed in the case cited by the commentators who mentioned this issue, and lies somewhere between the balance of probabilities (civil standard) and beyond a reasonable doubt (criminal standard). In *British and Commonwealth Holdings*, it was held that the court must "be satisfied that the plaintiff *will* succeed and the burden is a high one; it is not enough that the court thinks it likely that the plaintiff will succeed at trial."[65]

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[61] Note 29, above, at 172.

[62] Note 29, above, at 172.

[63] Note 47, above.

[64] [1989] 3 All E.R. 492 (C.A.) [hereinafter *British and Commonwealth Holdings*].

[65] Note 64, above, at 511 (emphasis not added). See also *Shanning International Ltd.* v. *George Wimpey International Ltd.*, (1988) 3 All E.R. 475 at 483 (C.A.), in which Glidewell, L.J. stated that the plaintiff "must satisfy the court on the balance of probabilities but to a high standard."

The Commission now considers it appropriate to take a position on what standard of proof would be required to "satisfy" a court that a plaintiff, applying for an interim payment, would succeed in an action at trial. The Commission notes a number of concerns in this regard. The standard should be high enough to provide a sufficient degree of confidence that the award of an interim payment will not be overturned at trial. On the other hand, if the standard is too high, it might encourage certain defendants to put forth dubious defenses, in the knowledge that they have a good chance of preventing interim payment from being awarded. As a result, the Commission agrees a relevant standard for an expanded rule should lie somewhere between the balance of probabilities, a lower standard of proof, and the criminal law standard, which is a much higher test. The Commission is of the view that the standard of proof used in Scotland, where "satisfied" in this context means that a plaintiff "would almost certainly succeed on the question of liability at least to some extent," is an appropriate test, which best balances the need to make interim payments accessible in appropriate cases with the requirement for certainty. In the context of an expanded interim payment rule, the Commission therefore recommends that to satisfy a court means that a plaintiff will "almost certainly succeed on the question of liability at least to some extent."

c. Summary judgment

A number of commentators mentioned summary judgment. Some commentators suggested that the ease with which a summary judgment application could be defeated pointed the way to revision of the interim payment rule. On the other hand, it was also suggested that summary judgment should continue to be difficult to obtain, as the effect of prematurely determining a defendant's liability at the application stage, when all relevant evidence would not be before the court, would be serious. Other commentators indicated that if there is any inadequacy with the current interim payment scheme, it lies not with the interim payment rule itself, but with the summary judgment rule. These commentators suggested that the Ontario *Rules of Civil Procedure*, which allow both plaintiffs and defendants to apply for summary judgment, could serve as a model for revising the relevant Nova Scotia rule. In Ontario, under Rule 20, summary judgment will be granted "[w]here the court is satisfied that there is no genuine issue for trial with respect to a claim or defence...." Both parties, the applicant for summary judgment and the party who responds, must rely on affidavits or other evidence. It is not adequate, for example, simply to deny what is stated in a party's pleadings.

An application for summary judgment can take place in the context of any type of litigation. The Commission is of the view that without an examination of the nature of summary judgment and of the possible effects on civil litigation generally, it would be premature, in the context of a study of the interim payment rule, to make any recommendations for changes to the summary judgment rule. An important distinction between summary judgment and an interim payment award should be noted. The Commission's proposed expansion of the interim payment rule would not affect a defendant's liability, as that would still be a matter to be decided at trial. Summary judgment, though, involves a determination of liability which, apart from an appeal, conclusively determines the parties' rights and obligations.

The Commission acknowledges that the *Ricci* decision[66] has been called into question in relation to one aspect of English law. Under the pre-1999 English rules of court, if an application for summary judgment was made, a court could grant the application or could allow the defendant leave to defend, either on a conditional or unconditional basis. Conditional leave could be granted where there was a good ground for believing the defence set up was a sham or the court was prepared very nearly to give judgment for the plaintiff.[67] The court in *Ricci* supported in general the availability of an interim payment even where unconditional leave had already been granted. Subsequent English cases did not question the standard of proof that was applied in the *Ricci* decision. However, in later cases, it was pointed out that it seemed inconsistent to allow interim payment when unconditional leave to defend had already been granted. In *British and Commonwealth Holdings*, Browne-Wilkinson, V-C commented:[68]

> *For myself, I find it an impossible concept that the same court can be simultaneously "satisfied" that the plaintiff will succeed at trial and at the same time consider that the same defendant has an arguable defense sufficient to warrant unconditional leave to defend. If there is a distinction between the two concepts which I have failed to detect, such distinction must in my judgment be the result of "an uncommon nicety of approach" which the requirements of certainty in the law would make it undesirable to recognize. In my judgment, therefore, it is impossible to make an order for an interim payment where unconditional leave to defend has been given.*

Browne-Wilkinson, V-C accepted that it would be possible for a plaintiff to receive an interim payment even though a defendant had been granted conditional leave to defend. He identified the appropriate circumstances for conditional leave as "where the defence is shadowy and [where it] may well not be put forward on genuine grounds," and "in cases where on the evidence then before it, the court entertains sufficient doubt as to the genuineness of the defence..."[69]

The Commission does not believe that an expanded interim payment rule will lead to results inconsistent with application of the Nova Scotia summary judgment rule. Those plaintiffs who currently seek summary judgment, as a prerequisite to having access to interim payment, will no longer have to do so, as interim payment would be available directly. In those situations where a court does not grant summary judgment (and therefore grants leave to defend), but is

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[66] Note 47, above.

[67] *M.V. Yorke Motors (a firm)* v. *Edwards*, [1982] 1 WLR 444 at 450. The current English *Civil Procedure Rules*, at rr. 3.1(3) & 24.6, still permit the granting of conditional leave to defend, though the wording in this context has changed considerably in relation to the pre-1999 summary judgment rule.

[68] Note 64, above, at 511 (emphasis as in original).

[69] Note 64, at 511.

skeptical of the defence put forth by the defendant, it will be possible for the court to express its doubts in the form of a conditional leave to defend, as was mentioned in the *British Holdings* case. Under R. 13.02(d), the court may "allow the defendant to defend the claim or part thereof, either unconditionally or on terms relating to giving security, time, the mode of trial, or otherwise." This wording is very similar to that used in the pre-1999 English rule which was discussed in *British and Commonwealth Holdings*. This rule allows the court to avoid the potentially contradictory situation of leave to defend (based upon the defendant having set out a *bona fide* defence or arguable issue) co-existing with an interim payment order (based upon the plaintiff being perceived as likely to succeed at trial).

d. Separate trials

The Nova Scotia *Civil Procedure Rules* currently allow a plaintiff's action to be decided in the form of two trials, one on liability and the other on damages.[70] Separate or split trials, also referred to as severing the issues of liability and damages, might be used where it is apparent that the full extent of a plaintiff's damages may not be known for some time. One example would involve an injured child who has not yet fully recovered. It would be premature for a court to decide the amount of an injured child's damages, when a number of years might have to elapse before the full effect on the child's health and lifestyle was known. In the meantime, though, the parties could still make progress in the litigation by having the issue of liability determined. If no liability was found, then the plaintiff's action would end. Whether to allow a trial to proceed on a separate basis is not automatic, but is part of a court's discretion. The normal practice is for questions of liability and damages to be tried together, but a court should be ready to order separate trials "whenever it is just and convenient to do so."[71] To decide what is just and convenient, the court must consider the effect of such a decision on all the parties, as well as on the court system.[72]

In *Rajkhowa* v. *Watson*, Hood, J. identified a number of factors to be taken into account in making a decision about whether a separate trial involving liability and damages would be appropriate:[73] whether it is an extraordinary and exceptional case; whether the issue to be tried is simple; whether the issue to be tried separately is not interwoven with other issues in the action; whether there is some evidence which makes it probable that the trial of the separate

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[70] See rr. 25.01(1), 28.04, and 33.01(1).

[71] *Rajkhowa* v. *Watson* (April 12, 2000), C.A. 160670, para. 51 (N.S.C.A.).

[72] Note 71, above, para. 43.

[73] *Rajkhowa* v. *Watson* (1999), 180 N.S.R. (2d) 324 at 325 (S.C.). The first four factors are from *Fraser* v. *Westminer Canada Ltd.* (1998), 168 N.S.R. (2d) (S.C.), and the fifth factor is from *Piercey* v. *Board of Education of Lunenburg County District* (1993), 128 N.S.R. (2d) 232 at 235 (S.C.).

issue will put an end to the action. Another factor to be considered would be the danger of introducing a substantial delay.[74]

Some commentators suggested that the availability of separate trials on liability and damages could preclude the need for an expanded interim payment rule. If successful on the question of liability, they suggested, a plaintiff could then apply for an interim payment. The Commission does not disagree that the severance of liability and damages issues could be beneficial in some cases. The Commission points out, however, that as the availability of separate trials is part of a court's discretion, there is no guarantee of separate trials being allowed. The use of separate trials also does not address how a plaintiff in financial need is expected to pay his or her expenses in the pre-trial period. If the amount of evidence in relation to liability issues is considerable, then it could be quite some time before the parties are ready to proceed with a trial on liability. Moreover, holding two trials to decide a dispute might lead to a certain amount of repetition and inefficiency, resulting in higher costs. To help reduce costs, a plaintiff may prefer to have all issues decided at the same time. The Commission is therefore of the view that the availability of separate trials, on liability and damages, does not on its own preclude the need for an expanded interim payment rule.

e. Section B benefits

Some commentators also proposed that Section B benefits should be increased. Section B benefits are mandatory benefits provided to people who sustain bodily injury or death arising from the operation or use of an insured automobile. These benefits are paid by the vehicle's insurer to compensate for such aspects as medical expenses, rehabilitation costs, and lost employment income attributable to a motor vehicle accident.

Raising Section B benefits would assist persons injured in motor vehicle accidents, but it would not be of help to other plaintiffs. For example, a plaintiff who has been unjustly dismissed will not be entitled to anything similar to Section B benefits in the period before settlement or trial judgment. As the Commission has in mind an interim payment rule which is potentially applicable to all types of civil actions,[75] it would not be a complete solution to propose raising Section B amounts. Moreover, the amount of Section B benefits is a matter of government policy, which has been reached after public consultations. The issue of increasing Section B levels can lead to other questions, such as whether a no-fault compensation scheme for motor vehicle accidents would be appropriate for Nova Scotia. As a policy issue, whether or not to increase the level of Section B benefits is best left to the Government, to be decided after widespread consultation and legislative debate.

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[74] Hood, J.'s decision was reversed on appeal: note 71, above. The Court of Appeal did not disagree with the factors identified by Hood, J. Rather, the reversal rested on application of the factors to the particular circumstances.

[75] See Part III.2, below.

The Commission recommends:

- The Nova Scotia rule pertaining to interim payment of damages should be expanded, to allow for interim payment where liability is still in question. The rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.
- To satisfy a court in this context means that a plaintiff will "almost certainly succeed on the question of liability at least to some extent."
- Without an examination of the nature of summary judgment and of the possible effects on civil litigation generally, it would be premature, in the context of a study of the interim payment rule, to make any recommendations for changes to the summary judgment rule.
- The availability of separate trials, on liability and on damages, does not on its own preclude the need for an expanded interim payment rule.
- As a policy issue, whether or not to increase the level of Section B benefits is best left to the Government, to be decided after widespread consultation and legislative debate.

2. Should interim payment of damages be restricted to a particular type of action?

The Nova Scotia rule does not restrict interim payment of damages to any type of action. The New Brunswick rule contains no such restriction, but its *Insurance Act* confines interim payment to actions stemming from automobile accidents.[76] The Bermuda rule[77] is restricted to personal injury cases, and the Scottish rule[78] applies both to actions for personal injuries and

[76] N.B. *Insurance Act*, note 5, above, ss. 265.1 & 265.6(1).

[77] Bermuda rule, note 5, above.

[78] Scottish rule, note 5, above, r. 43.8(1).

for death resulting from personal injuries. In South Australia[79] and in New South Wales,[80] interim payment orders can be made in any type of action for damages. The English rule allows interim payment for claims in relation to "any damages, debt or other sum...."[81]

The Western Australia Law Reform Committee recommended that the court power to order interim payment of damages should apply in all personal injury cases. That Committee was concerned about the hardship a plaintiff might suffer while waiting for damages to be ascertained.[82] The Manitoba Law Reform Commission recommended that interim payment should be available in all civil proceedings. The Manitoba Commission noted that though plaintiffs in personal injury cases may have the greatest need for financial assistance, other types of plaintiffs might sustain financial difficulties while awaiting trial.[83] The Parliament of Victoria report only considered the advisability of an interim payment of damages rule in the context of claims arising from personal injuries suffered through the use of health services.[84]

In its Discussion Paper, this Commission recognized that interim payment of damages might be especially needed in the context of a personal injury claim. A plaintiff who has suffered bodily injury may no longer be able to work, and therefore may have no income with which to pay for expenses arising because of his or her injuries. It was also suggested that financial hardship brought on by a defendant's wrong is not confined to personal injury situations. For example, a plaintiff whose livelihood depends on particular property, such as a vehicle, equipment, or a building, might similarly have his or her income reduced or cut off if the defendant's wrong damaged or destroyed the property. Delays in going to trial could result in financial hardship for plaintiffs in such other proceedings as contractual claims, actions for *wrongful death*,[85] product liability actions, wrongful dismissal claims, trespass to land, misappropriation of funds, and actions for property damage. In its Discussion Paper, the Commission did not seek to limit unnecessarily the situations in which a claim for interim payment could be made. On the other hand, the Commission did not wish to extend interim payment to a specific type of action if the nature of that action might make interim payment

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[79] South Australia rule, note 5, above s. 30B(1).

[80] N.S.W. rule, note 5, above, s. 76E(1). S.76H of the New South Wales *Supreme Court Act*, note 5, above, provides that claims arising from motor vehicles accidents are excluded. Rather, such claims are be governed by s. 45 of the *Motor Accidents Act 1988* (N.S.W.), which also provides for interim payment from insurers, but only where liability is admitted or judicially determined. As the authority for such payments comes from the *Motor Accidents Act*, no court order is required.

[81] England & Wales, *Civil Procedure Rules 1998*, r. 25.1(1)(k).

[82] Western Australia Report, note 4, above, at 7.

[83] Manitoba Report, note 10, above, at 7-8.

[84] Note 40, above, para. 7.40.

[85] Where a person is killed as a result of someone else's wrong, the victim's dependants may seek compensation, through a wrongful death action, for the value of lost financial and emotional support: see J.R. Nolan & M.J. Connolly, *Black's Law Dictionary*, 5th ed. (St. Paul, Minn.: West, 1979) at 1446.

inappropriate. The Commission suggested that the interim payment rule[86] should continue to be available for personal injury actions. The Commission also invited comments about what types of actions, in addition to personal injury actions, may or may not be suitable for the availability of interim payment of damages.

Among comments received on the Discussion Paper, the Commission was not provided with any reasons for excluding certain types of claims from application of the interim payment rule. More specifically, no commentators suggested that the interim payment rule should no longer be available for personal injury actions. In fact, most commentators seemed to consider the merits or drawbacks of the rule in the context of a claim arising from a motor vehicle accident. One commentator suggested that the interim payment rule would also be appropriate in the context of a claim for wrongful dismissal, as a person who has been wrongfully dismissed is often left with little or no resources with which to sue a well-funded employer.

The Commission is of the view that interim payments are especially relevant in the context of personal injury and unjust dismissal claims, as both types of claims may involve situations where a plaintiff's income is significantly reduced or cut off. Rather than attempting, however, to identify all possible situations in which interim payments might be appropriate, the Commission recommends that a liberal approach should be used in applying the interim payment rule. As a result, the Commission recommends that the interim payment rule should be available in all types of civil proceedings.

The Commission recommends:

- A liberal approach should be used in applying the interim payment rule, which should be available in all types of civil proceedings.

3. Should both special and general damages be available for an interim payment?

Special damages compensate a plaintiff for pre-trial financial losses or expenditures which result from a defendant's wrong.[87] Special damages can be objectively identified and assigned a precise monetary value. Examples include lost wages, medical bills, repair expenses, and travel costs. *General damages* compensate a plaintiff for intangible results of a wrong, such as pain and suffering, mental distress and loss of quality of life.[88] General damages can also

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[86] For this suggestion and those which follow, the Commission has in mind an expanded rule, which can provide for interim payment of damages where liability is still in question.

[87] See Munkman, note 1, above, at 42; Dukelow & Nuse, note 1, above, at 1009.

[88] See Munkman, note 1, above, at 42; Dukelow & Nuse, note 1, above, at 43.

include a claim for future lost earnings[89] and for future loss of earning capacity.[90] Given the intangible or unknown factors involved, which cannot be measured with mathematical precision, calculating general damages is a matter of great subjectivity.

No explicit limitation on the type of damages available for an interim payment is found in the the Nova Scotia rule.[91] In both *MacNeil*[92] and *Bogaczewicz*,[93] general damages were awarded. The New Brunswick rule[94] and *Insurance Act*[95] limit interim payment to special damages. The rules in England,[96] Scotland,[97] and New South Wales[98] are not restricted to special damages. Where an action for personal injury is involved, the rule in South Australia occupies a middle ground. Generally, general damages are not to form part of an interim payment. One exception is "where serious and continuing illness or disability results from the injury...."[99] Another exception applies in the case of a plaintiff who is incapacitated or partially incapacitated for employment, and whose *contributory negligence* has diminished the amount of special damages to which he or she is entitled.[100] The limit on general damages is then set by reference to the amount of special damages incurred.[101]

The Western Australia Law Reform Committee was not in favour of including general damages in an interim payment. It stated that the concept of awarding damages once and for all should be interfered with as little as possible, with the only justification for interference being to lessen economic hardship. It suggested that it would not be a good idea to fragment a general damages award. Given their subjective nature, assessing general damages can be difficult. This could be made more difficult by the need to ensure that what is awarded at trial does not include amounts which had already formed part of an interim payment. It was also

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[89] Munkman, note 1, above, at 42.

[90] *Newman* v. *LaMarche and Black* (1994), 134 N.S.R. (2d) 127 at 132 (C.A.).

[91] In *Bogaczewicz*, note 14, above, only general damages were awarded in the form of an interim payment.

[92] Note 18, above.

[93] Note 14, above.

[94] New Brunswick rule, note 5, above.

[95] N.B. *Insurance Act*, note 5, above, s. 265.6(1).

[96] English rule, note 5, above.

[97] Scottish rule, note 5, above.

[98] N.S.W. rule, note 5, above.

[99] South Australia rule, note 5, above, s. 30B(2)(b).

[100] Contributory negligence refers to the extent, if any, to which a plaintiff, by failing to take reasonable care, caused his or her injury and therefore the amount of damages suffered: see Dukelow & Nuse, note 1, above, at 211-212. Courts reduce damages in proportion to the amount which can be attributed to the plaintiff's contributory negligence. This is discussed further at Part III.5, below.

[101] South Australia rule, note 5, above, s. 30(B)(2)(b).

suggested that including general damages might lead to an overpayment, which a defendant might not be able to recover. Moreover, should a claimant die after an interim award of general damages was made, this amount would be awarded to that person's *estate*.[102] The Western Australia Committee questioned the appropriateness of such a windfall.[103] It suggested that an interim payment should include special damages to the date of hearing and if necessary, could take the form of periodic payments thereafter to cover established future loss of earnings, hospital and medical expenses and other necessary expenses pending a further hearing.[104]

The New South Wales Law Reform Commission and the Manitoba Law Reform Commission were also in favour of limiting interim payment to special damages.[105] The Manitoba Commission suggested that the purpose of interim payment is not to compensate the plaintiff for the total amount of damages he or she would receive if the trial were held the day of the application. Rather, the Manitoba Commission suggested that interim payment is to prevent a plaintiff from suffering undue financial difficulty prior to trial which would force him or her to settle for less than full entitlement.

The Manitoba Commission gave additional reasons for a limitation on interim payment of damages:[106]

1. Special damages represent real financial losses.
2. They are easily established.
3. General damages are more subjective. It is consequently harder to maintain judicial consistency.
4. The risk of overpayment will be increased if general damages are provided as a basis for interim payment.
5. The plaintiff may be disappointed when the final award of damages is made if most of the award takes the form of general damages which have already been provided.

The Manitoba Commission acknowledged that interim payment which includes general damages could more accurately reflect the amount a plaintiff is entitled to receive as of the date of his or her application, but concluded that the negative factors outweighed this positive aspect.

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[102] An estate includes everything that a person owns at the time of his or her death: see *Black's Law Dictionary*, note 85, above, at 491.

[103] Western Australia Report, note 4, above, at 8.

[104] Note 4, above, at 10.

[105] N.S.W. Commission Working Paper, note 36, above, at 23.

[106] Manitoba Report, note 10, above, at 10-11.

In the Discussion Paper, this Commission acknowledged that general damages, which involve a great deal of subjectivity, can be difficult to calculate. Nonetheless, in some situations, awarding only special damages may not be adequate to meet a plaintiff's needs. This could be especially so if courts, fearing the possibility of overpayment, choose to be conservative about the amount of interim payment they award. At the time of applying for an interim payment, a plaintiff may also not have available the information required to prove all aspects relating to the special damages portion of his or her claim. The Commission did not consider it helpful to impose a restriction on the interim payment rule which could mean that the plaintiff's financial difficulties might not be redressed in some instances. This would be contrary to a key justification for the interim payment rule. The Commission therefore suggested that both special and general damages should be available, if relevant, for inclusion in an interim payment.

Comments on this issue tended to mirror positions taken on expansion of the rule: commentators in favour of expanding the rule favoured the availability of general damages, while commentators who did not agree that the rule needed to be expanded preferred it to be confined to special damages.

The Commission is of the view that a flexible interim payment rule is a fair rule, as it can be adapted to accommodate the particulars of different situations. Restrictions should only be placed on the interim payment rule where they would be necessary to prevent unfairness. The Commission considers it important that an interim payment rule be able to take into account the situation where special damages are not adequate to meet a plaintiff's pre-trial needs, or where there may not be sufficient information available about the plaintiff's special damages. On the other hand, there would be no requirement for a court at the interim payment stage to take into account any possible general damages. As a result, the Commission affirms its Discussion Paper proposal and recommends that both special and general damages should be available, if relevant, for inclusion in an interim payment.

The Commission recommends:

- Both special and general damages should be available, if relevant, for inclusion in an interim payment.

4. Should a plaintiff have to demonstrate need?

The most frequently mentioned justification for the availability of interim payment of damages is that it can help to alleviate a plaintiff's financial hardship in the period before a court can determine all the issues between the parties.

The Nova Scotia rule is silent as to whether or not a plaintiff must demonstrate need. In *Bogaczewicz*,[107] the Nova Scotia Supreme Court, in examining the nature of the Rule, did not insist upon a needy plaintiff. Although stating, "[u]ndoubtedly, part of the rationale for adopting this new rule was to alleviate hardship," Goodfellow, J. added, "the drafters have not made need a prerequisite for recovery."[108] In *Mahoney*, Goodfellow, J. indicated that with the possible exception of where a payment is directed to be made for ongoing treatment, "what a Plaintiff does with any interim payment... is the sole determination of the Plaintiff who can do with his damage award, interim or otherwise, as he sees fit."[109]

The New Brunswick rule does not refer to need, but its *Insurance Act* permits a judge to take into account the plaintiff's "needs and resources."[110] The English,[111] Scottish,[112] and New South Wales[113] rules do not mention need. In *Stringman* v. *McArdle*, which involved the pre-1999 version of the English rule, the English Court of Appeal held that a plaintiff does not have to demonstrate any particular need over and above the general need to be paid his or her damages as soon as may reasonably be done.[114] Stuart-Smith, L.J. stated that where the plaintiff is an adult of sound mind, the court "is not concerned in any way with what the plaintiff does with his damages."[115]

As pointed out by the New South Wales Law Reform Commission, the needs of individual plaintiffs can vary greatly. The New South Wales Commission therefore considered it appropriate to take into account a plaintiff's earning capacity, if any, as well as what would have been the plaintiff's standard of living, if he or she had not suffered a wrongfully caused injury. That Commission seemed to suggest an interim payment must be adequate to provide, in the period before trial, for the maintenance of the plaintiff and his or her dependants and for the relief of the plaintiff's medical expenses, as well as for any physical and mental distress.[116] The Parliament of Victoria Law Reform Committee took the position that it should not be necessary for a plaintiff to show need, hardship, or another prejudice, though a court could

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[107] Note 14, above.

[108] Note 14, above, at 9.

[109] Note 29, above, at 172-173.

[110] N.B. *Insurance Act*, note 5, above, s. 265.6(4)(e).

[111] English rule, note 5, above.

[112] Scottish rule, note 5, above.

[113] N.S.W. rule, note 5, above. At least one court in New South Wales has indicated that a plaintiff's need is not a precondition to receiving an interim payment of damages. Rather, the absence of need or hardship on the plaintiff's part would be a factor to be taken into account by the court in deciding whether to order an interim payment: see *Provisional Damages*, note 46, above, at 26.

[114] (1993), [1994] 1 W.L.R. 1653 at 1657 (C.A.).

[115] Note 114, above, at 1657.

[116] N.S.W. Commission Working Paper, note 36, above, at 20.

take this into account as part of its discretion.[117] In a 1994 report, the English Law Commission took the position that need should not have to be established as a prerequisite to an interim payment.[118]

In approaching this issue in the Discussion Paper, this Commission acknowledged how variable a concept "need" can be. For some people, need could pertain merely to the basic necessities of life, while for other people, need could involve such additional aspects as transportation, education, and recreation. Even if one can agree on the elements of need, the needs of individual people vary. In terms of quantity and quality, for example, what can suffice for one person may not be adequate for another. Need can also be immediate, future or both. As need tends to be a highly variable concept, the Commission was of the view that the interim payment rule should not require a plaintiff to show need.[119]

Among feedback received, perspectives on this issue tended to parallel viewpoints on the expansion of the rule generally. If in favour of expanding the interim payment rule, commentators tended not to insist that a plaintiff show need. Commentators who did not agree with expanding the rule, however, would require a plaintiff to establish financial need prior to receiving an interim payment. Otherwise, those commentators maintained, there would be no reason to provide an interim payment. They expressed concern that without a requirement for plaintiffs to show need, abuse could result, in the form of non-essential expenditures and prolonged litigation. One commentator also suggested that the existing rule should be modified to require that any interim relief award be made payable directly to the plaintiff, without deduction or discount by the plaintiff's lawyers for legal fees or disbursements. However, if defendants are truly concerned about how an interim payment might be spent, another commentator mentioned, they should be required to suggest to the court specific conditions on use of an interim payment.

The Commission continues to have a number of concerns about requiring a plaintiff to prove need prior to receiving an interim payment. As discussed in the Discussion Paper, need is a relative concept. In addition, some commentators suggested that because the interim payment rule has often been explained as a means of preventing economic hardship on the part of the plaintiff, it would only be consistent to require need on the part of an interim payment applicant. The Commission points out, however, as identified by Goodfellow, J. in *Bogaczewicz*,[120] there is a difference between identifying a factor which may have led to the development of the rule and actually requiring plaintiffs to prove need. As discussed earlier,

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[117] Parliament of Victoria report, note 40, above, para. 7.51.

[118] The Law Commission (Eng.) *Structured Settlements and Interim and Provisional Damages* [hereinafter *Structured Settlements*] (London: HMSO, 1994) at 84-87.

[119] If a plaintiff does not have to show need, then similarly a plaintiff should not have to prove an ability to repay the amount of an interim payment.

[120] Note 14, above, at 9.

at Part II.2 of this Final Report, eliminating a plaintiff's financial hardship is not the only justification for the interim payment rule. Based upon the foregoing, the Commission recommends that the interim payment rule should not require a plaintiff to show need.

The Commission recommends:

- The interim payment rule should not require a plaintiff to show need.

5. Should a plaintiff's contributory negligence prevent access to interim payment of damages?

One of the issues which a court may have to decide at trial is whether there was any contributory negligence by the plaintiff. Contributory negligence refers to the extent, if any, to which a plaintiff, by failing to take reasonable care, contributed to his or her injury and therefore the amount of damages suffered. At trial, if contributory negligence by a plaintiff is found, the court will determine its effect and, if relevant, reduce the amount of any damages award accordingly. For example, it might be found that a plaintiff injured in a motor vehicle accident would not have been hurt to the same extent had he or she been wearing a seat belt. The Nova Scotia rule requires the court, in determining the amount of an interim payment, to take into account "any relevant contributory negligence" of the plaintiff.[121] Similar provisions are in place in England[122] and New South Wales.[123] The New Brunswick rule does not mention contributory negligence, but its *Insurance Act* allows a judge, as one of a number of factors, to take into account the extent, if any, to which the plaintiff may be found contributorily negligent.[124] In South Australia, a plaintiff's contributory negligence will not by itself disentitle him or her to an interim payment. Rather, if a plaintiff's contributory negligence reduces his or her entitlement to special damages, the court will consider whether general damages might be used to provide the funds for an interim payment.[125] The Scottish rule is more restrictive, requiring a court to be satisfied that a plaintiff would succeed at trial on the issue of liability "without any substantial finding of contributory negligence on his part...."[126]

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[121] *Bogaczewicz*, note 14, above, at 9.

[122] English rule, note 5, above, r. 25.7(5).

[123] N.S.W. rule, note 5, above, s. 76E(6).

[124] N.B. *Insurance Act*, note 5, above, s. 265.6(4)(c).

[125] South Australia rule, note 5, above, s. 30B(2)(b).

[126] Scottish rule, note 5, above, s. 43.9(3)(b).

The Winn Committee recommended that interim payment of damages should not apply in any case where a defendant could properly allege the plaintiff had been contributorily negligent. The Winn Committee suggested it would be difficult for a court to examine the issue of liability at a preliminary stage, with only written evidence, as opposed to the oral testimony of witnesses who would testify at trial, to consider. The Winn Committee did not believe that such a rule would be abused by defendants' lawyers, as "[e]thics or sanctions [would] exclude merely tactical pleas of contributory negligence."[127] Referring to that Winn Committee conclusion, the Manitoba Law Reform Commission agreed that interim payment should only be available where a plaintiff would succeed entirely at trial. The Manitoba Commission, noting the subjectivity involved in determining the amount of contributory negligence, suggested it would be difficult to achieve a consensus on that issue between the judge hearing the application for interim payment and the trial judge. The Manitoba Commission pointed out that deciding upon the existence and effects of contributory negligence was a matter of great subjectivity.[128]

In approaching this issue, the Western Australia Law Reform Committee was guided by the need to relieve financial hardship. As a result, it recommended that even where a plaintiff had been contributorily negligent, the court should have the power to order payment up to the full amount of special damages suffered, where not to do so would cause hardship. The Western Australia Committee acknowledged a possibility of overpayment, in that the plaintiff would receive an amount which would eventually have to be reduced in proportion to the consequences of his or her own negligence. The Committee therefore added that in making an interim payment in spite of the plaintiff's contributory negligence, it should appear to the court that a final award of general damages would exceed the amount of the additional payment.[129] Similarly with a needy plaintiff in mind, the New South Wales Law Reform Commission was of the view that the plaintiff's contributory negligence should not affect the amount to be received under an interim relief order. Such an amount should represent "substantially, what the plaintiff must have to meet his needs until the damages are assessed."[130] The Parliament of Victoria Law Reform Committee cautioned that courts should not require defendants to pay an amount in the form of interim damages which would exceed the sum that the defendants would ultimately have to pay at the end of proceedings. The Victoria Committee was therefore in favour of a number of restrictions from the English and New South Wales rules, including the need to take into account a plaintiff's contributory negligence.[131]

This Commission's Discussion Paper took the position that it would be unfair to deprive a plaintiff entirely of an interim payment because of contributory negligence. On the other hand,

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[127] Winn Report, note 8, above, at 35.

[128] Manitoba Report, note 10, above, at 9.

[129] Western Australia Report, note 4, above, at 11.

[130] N.S.W. Commission Working Paper, note 36, above, at 24.

[131] Note 40, above, para. 7.44.

the Commission acknowledged that a plaintiff should not enjoy at a preliminary stage greater relief than is likely at trial. If apparent to a court that the plaintiff's award would be diminished at trial because of contributory negligence, it was suggested, then this issue should be taken into account at the time of an application for interim payment. The Commission therefore took the position that to accommodate both concerns, a plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

Among those commentators who provided feedback, there was general agreement with the Commission's suggestion about contributory negligence. One commentator did caution that investigation of the contributory negligence issue could turn an application for an interim payment into a "mini trial" taking a day or longer. On the other hand, the same commentator acknowledged, to deny an interim payment simply on the basis of contributory negligence might encourage some defendants to make questionable allegations of contributory negligence. As a result, the commentator suggested that how to treat the issue of contributory negligence should be left to the discretion of the judge dealing with the application.

The Commission is of the view that fairness in the context of interim payment can best be achieved through a rule which attempts balance between the interests of plaintiffs and defendants, and which is also flexible, able to take into account certain factors when relevant. The Commission, affirming its Discussion Paper suggestion, recommends that a plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but should be retained as a factor to be taken into account by the court.

The Commission recommends:

- A plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

6. Should other factors be used to lessen or prevent interim payment of damages?

a. Mitigation of damages

Other factors with a bearing on the amount of any ultimate damages awarded at trial may have to be taken into account as part of an interim payment. Plaintiffs who have suffered from a defendant's wrong have an obligation to take reasonable steps to *mitigate* or minimize their damages.[132] For example, a plaintiff who has suffered bodily injuries might be advised by his

[132] See Dukelow & Nuse, note 1, above, at 647.

or her physician to undergo physiotherapy. A plaintiff who without good reason fails to follow such advice would not be making all reasonable efforts to lessen the effect of his or her injuries. At trial, a court will, if applicable, reduce a damages award by a proportion attributable to the plaintiff's failure to mitigate.

The Nova Scotia rule does not mention mitigation of damages. In South Australia, a failure by the plaintiff "without reasonable cause" to undertake "reasonable medical treatment" means that a court "shall not award damages for such disability, pain or suffering as would have been remedied but for such failure."[133] Similarly, an incapacitated or partially incapacitated plaintiff who fails to mitigate by rehabilitation for employment will only be entitled to a maximum of 75% of his or her loss of earnings.[134] The New Brunswick *Insurance Act* permits a court to take into account any failure by the plaintiff to mitigate.[135] The Manitoba Law Reform Commission suggested that since a plaintiff does not benefit at trial from a failure to mitigate his or her damages, a plaintiff should not benefit from such a failure at the time of applying for an interim payment.[136]

As with contributory negligence, in its Discussion Paper this Commission agreed that a plaintiff should enjoy no greater relief at the time of making an application for interim payment than he or she would receive at trial. As a result, the Commission suggested that mitigation of damages should be included as a factor which may be taken into account by a court when deciding the amount of an interim payment of damages.

b. Set off, counter-claims, and cross-claims

Another factor which might be taken into account by a court in assessing damages is whether a defendant has a legitimate claim that could be used to reduce the amount of any award which the defendant is ordered to pay. This could take a number of forms. *Set off* involves applying an amount, owed to a defendant from an unrelated matter, to reduce an award in a proceeding before a court.[137] By way of *counter-claim*, a defendant can assert that he or she is entitled to a sum from the plaintiff in the same matter concerning which the plaintiff has brought an action.[138] A *cross-claim* is a claim made by a defendant against another defendant in the same action.[139] To illustrate these concepts, imagine that plaintiff A was a pedestrian, struck and injured by a car driven by defendant B. In the accident, B's car was also damaged. When B's

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[133] South Australia rule, note 5, above, s. 30B(7).

[134] Note 5, above, s. 30B(8).

[135] N.B. *Insurance Act*, note 5, above, s. 265.6(4)(d).

[136] Manitoba Report, note 10, above, at 15.

[137] See Manitoba Report, note 10, above, at 14, n. 10.

[138] See Dukelow & Nuse, note 1, above, at 226.

[139] Note 1, above, at 238.

car stopped, in order to avoid hitting A, another car, driven by defendant C, struck the back of B's car. The force of impact helped to propel B's car into A. Coincidentally, some time before the accident, A and B had business dealings. When A did not pay a debt, B commenced an action against A for the amount owed. As a defendant to A's personal injury action, B could claim that the amount owed by A should be set off or deducted from any damages award obtained by A. If B considered A to be responsible for the accident, as for example, by not paying proper attention when crossing the street, then B could counter-claim against A for the cost of repairs to B's car. In addition, if B believed that C had contributed to the accident, B could cross-claim against C for some or all of the damages which A might be awarded.

The Nova Scotia rule requires a court to take into account any set off, cross-claim, or counter-claim on which the defendant may be entitled to rely.[140] In England, a court is required to consider any relevant set off or counter-claim.[141] The New Brunswick *Insurance Act* permits a judge to take into account any amount counter-claimed by the defendant.[142] Courts in New South Wales are required to take into account "any cross-claims on which the defendant may be entitled to rely."[143]

The Parliament of Victoria Law Reform Committee expressed support for taking into account any set-off, counterclaim, or cross-claim. That committee considered it important that an amount awarded in the form of an interim payment not exceed the sum awarded at trial.[144]

In its Discussion Paper, this Commission took the position that set off, counter-claims, and cross-claims should be retained as factors to be taken into account by a court. It was suggested this would help to ensure that a plaintiff's entitlement to relief is no greater at the application stage than at trial.

For the most part, comments received were in favour of the Commission's suggestions concerning other factors used to lessen or prevent interim payment of damages. Those commentators who expressed some disagreement tended not to question the factors themselves, but rather whether it was necessary to identify the factors in an amended rule. For example, one commentator suggested that it would not be necessary to specify mitigation of damages as a factor to be considered, given that a civil court, when it assesses the amount of damages, already has the discretionary power to take into account mitigation of damages or the lack of mitigation. Another commentator was concerned that to include mitigation as a factor, the

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[140] *Bogaczewicz*, note 14, above, at 9.

[141] English rule, note 5, above, r. 25.7(5).

[142] N.B. *Insurance Act*, note 5, above, s. 265.6(4)(b).

[143] N.S.W. rule, note 5, above, s. 76E(6).

[144] Note 40, above, para. 7.44.

non-performance of which could be used to deny a plaintiff an interim payment, might encourage some defendants to make dubious claims that the plaintiff had failed to mitigate.

Having considered the feedback received, the Commission is of the view that to identify mitigation of damages, as well as set off, counter-claims, and cross-claims, as part of the interim payment scheme can be helpful by making it clear to the parties what factors might be taken into account as part of the court's discretion. This might encourage parties to underscore for the court certain relevant factors, but on the other hand, would not bind the court to apply any particular factor. As a result, the Commission affirms its Discussion Paper proposals on this issue. The Commission recommends that mitigation of damages should be included as a factor which may be taken into account by a court in this context. The Commission also recommends that set off, counter-claims, and cross-claims should be retained as factors.

The Commission recommends:

- Mitigation of damages should be included as a factor which may be taken into account by a court when deciding the amount of an interim payment of damages.
- Set off, counter-claims, and cross-claims should be retained as factors to be taken into account by a court when deciding the amount of an interim payment of damages.

7. Should specific formulas be used to determine the amount of interim payment of damages?

Under the Nova Scotia rule, the amount of an interim payment is in a court's discretion. An amount must, however, be "just" and not exceed "a reasonable proportion of the damages" which in the court's opinion are likely to be recovered by the plaintiff, after the factors identified at Parts III.5 and 6 above are taken into account.[145] In South Australia, an incapacitated or partially incapacitated plaintiff who fails to mitigate by rehabilitating for employment will be entitled in an interim payment to a maximum of 75% of his or her loss of earnings.[146] The Winn Committee suggested that in determining the amount of an interim payment, a limit of 33 1/3% of the estimated total likely to be recovered at trial should be

[145] *Bogaczewicz*, note 14, above, at 9. The N.S.W. rule, note 5, above, uses similar language.

[146] South Australia rule, note 5, above, s. 30B(8).

imposed.[147] The Manitoba Commission was not in favour of such percentages, suggesting they would tend to reduce the discretion of the judge hearing the application for interim payment.[148]

The circumstances which surround an action for damages can vary considerably, in such aspects as the amount of damages claimed, the plaintiff's income and savings, and the plaintiff's role, if any, in contributing to his or her damages. Given the variety of circumstances that can be involved, this Commission did not consider it useful in the Discussion Paper to suggest any specific formulas for an amended interim payment rule.

Among the comments received, there was general agreement with the Commission suggestion. In particular, one commentator suggested that specific formulas always seem to cause problems when being applied to actual facts, so it was best to rely on the discretion of judges to arrive at the appropriate result in each case.

Affirming its Discussion Paper proposal, the Commission recommends that the interim payment rule should not include any specific formulas for determining the amount of payment.

The Commission recommends:

- The interim payment rule should not include any specific formulas for determining the amount of payment.

8. Should the interim payment rule apply only to defendants with adequate financial means?

If interim payment of damages is meant to redress a perceived imbalance between plaintiffs and defendants, this justification would be undermined if interim payment actually put defendants at a disadvantage. Imposing a large interim payment on a defendant could produce the same inability to carry on with litigation that interim payment is meant to remedy in relation to plaintiffs. Where an action for personal injuries is involved, the Nova Scotia rule confines interim payment to defendants who would seemingly have sufficient resources with which to make an interim payment. A defendant must be insured in relation to the plaintiff's claim, must be a public authority, or must be "a person whose means and resources are such as to enable the person to make the interim payments."

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[147] Winn Report, note 8, above, at 34.

[148] Manitoba Report, note 10, above, at 15.

The rule in Scotland[149] requires in personal injury actions that the defendant be covered by insurance, be a public authority, or be a person with means and resources to enable him or her to make the interim payment. In addition to the requirements of insurance or being a public authority, an equivalent rule in New South Wales provides that interim payment will not be available if "the defendant would, having regard to the defendant's means and resources, suffer undue hardship if such a payment were to be made."[150] The English rule shares the criteria for personal injury actions that there be insurance for the defendant, or that the defendant be a public authority.[151]

In the Discussion Paper, the Commission was of the view that to make interim payment of damages workable, it should only be available where the defendant is financially capable of making the payments. The Commission took the position it would not be helpful simply to transfer the plaintiff's financial hardship to the defendant, without regard for whether this might equally make it difficult for the defendant to continue with litigation. The Commission also pointed out that obtaining an interim payment order would be of no use to a plaintiff if the defendant is unable to pay that amount. As a result, the Commission suggested that the interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.[152]

A plaintiff may not have available all relevant information relating to the defendant. The Discussion Paper therefore also suggested that if a defendant wishes to argue he or she does not have sufficient means and resources with which to make an interim payment, that defendant should be required to prove the details of his or her financial situation.

There was general agreement with the Commission suggestions on this issue from those commentators who provided feedback. In particular, one commentator suggested that a defendant should not lose the right to defend a claim because he or she has been unable to make an interim payment.

In the interest of achieving a balanced rule, the Commission does not think that an interim payment award should subject a defendant to financial hardship. The Commission affirms its suggestions on this issue from the Discussion Paper and recommends that the interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment. The Commission also recommends that a defendant who

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[149] Scottish rule, note 5, above, r. 43.9(5).

[150] N.S.W. rule, note 5, above, s. 76E(4)(c). The Parliament of Victoria Law Reform Committee agreed with the N.S.W. approach: see note 40, above, para. 7.45.

[151] English rule, note 5, above, r. 25.7(2).

[152] The current requirement for a defendant to have sufficient resources is limited to personal injury actions: Nova Scotia rule, note 5, above.

wishes to claim he or she does not have sufficient means and resources should be required to prove the details of his or her financial situation.

The Commission recommends:

- The interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.
- A defendant who wishes to claim that he or she does not have sufficient means and resources should be required to prove the details of his or her financial situation.

9. Should the presence of multiple defendants affect the availability of interim payment of damages?

Establishing liability can be more difficult for a plaintiff when multiple defendants are involved. For example, at the time of making a claim, a plaintiff may be aware of multiple parties who may have been responsible for causing the plaintiff's injury, but the plaintiff may not know the identities of all the parties. The plaintiff may also not be aware of any relationship among the parties which may have a bearing on apportioning liability. As a result, obtaining an interim payment could be more difficult for a plaintiff who has to establish not only liability among a number of defendants, but also to show liability on the part of a particular defendant. It has therefore been suggested that it would be unfair to deprive a plaintiff of an interim payment simply because he or she is unable to identify, at the time of applying for the interim payment, the party from whom he or she is going to recover damages. On the other hand, it might also be unfair for one defendant to have to make an interim payment because another defendant, who is ultimately found liable, refused to admit liability.[153]

The Nova Scotia rule is silent on this issue. Until recently in England, in order to obtain an interim payment order against a particular defendant, a plaintiff had to satisfy the court that he or she would recover substantial damages from that defendant at trial.[154] Under the current English rule, which has been in force since 1999, the approach has changed somewhat. When a personal injury claim against two or more defendants is involved, the court may make an order for interim payment of damages against any defendant if satisfied that at trial, the plaintiff would obtain judgment for substantial damages against at least one of the

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[153] *Structured Settlements*, note 118, above, at 92.

[154] Munkman, note 1, above, at 180. Similarly, at least one court in New South Wales has held that an order for interim payment can only be applied against a defendant if that defendant was specified in the application for interim payment: see *Provisional Damages*, note 46, above, at 26.

defendants.[155] Similarly, in Scotland, a plaintiff need establish only that he or she will succeed at trial against at least one of the defendants in order to obtain an interim payment order applicable against all of them.[156]

The Manitoba Law Reform Commission was of the view that each defendant should be subject to the same standard. The Manitoba Commission suggested that requiring one defendant to make an interim payment, merely because liability could be clearly demonstrated against another defendant, would unfairly and unnecessarily expose the first defendant alone to the risk of the plaintiff not being able to repay after judgment.[157] As a result, the Manitoba Commission was in favour of requiring a defendant to make an interim payment based upon what seems to be his or her own liability, rather than simply because another defendant might seem liable. The Parliament of Victoria Law Reform Committee has also expressed support for that approach.[158]

Taking the view that the interim payment rule should be balanced, this Commission agreed in the Discussion Paper with the position of the Manitoba Law Reform Commission. This Commission pointed out that a defendant required to make an interim payment will have to bear the risk of the plaintiff not being able to repay part of this amount in the event of overpayment or an error on the part of the judge hearing the application. As a result, out of fairness, in order to obtain an interim payment from a particular defendant, this Commission suggested that a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

This issue did not generate much feedback. Some commentators seemed to suggest, though, that the Commission's proposal was too stringent, and that in the event of action against multiple defendants, to obtain an interim payment it should be sufficient for a plaintiff to satisfy the court that he or she would, or would be likely to, recover damages at trial from any of the defendants.

The Commission appreciates the need for any changes to the interim payment rule to be made in a balanced fashion, which respects the perspectives of both plaintiffs and defendants. The Commission is of the view that the balance would be placed too far in the favour of plaintiffs if they were able to obtain an interim payment against any one of a number of defendants, simply because the elements of the rule had been satisfied with respect to a single defendant. The Commission takes the position that out of fairness to defendants, if they are to be subjected to an interim payment, it should be because of their potential personal liability alone. As a

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[155] English rule, note 5, above, r. 25.7(3).

[156] Law Society of Scotland, *The Laws of Scotland* (Edinburgh: Butterworths, 1989) at para. 1395.

[157] Manitoba Report, note 10, above, at 13.

[158] Note 40, above, para. 7.43.

result, the Commission affirms its Discussion Paper proposal on this issue and recommends that in order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

The Commission recommends:

- In order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

10. Should details of an interim payment of damages order be disclosed at trial?

The existence of an interim payment, if known to a trial judge, could be perceived as exerting an influence on the judge's ultimate decision. For example, it might be perceived that the trial judge could consider it influential that a colleague had, at a preliminary hearing, found the defendant's liability to be so apparent that an interim payment had been ordered. It might also be perceived that knowledge of a voluntarily made interim payment could be taken as a sign of the defendant's acceptance of liability. It is important for the public to have confidence in the impartiality of judges. To prevent perceptions of potential undue influence, the English *Civil Procedure Rules* expressly require information concerning any interim payment not to be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided.[159] This restriction can be waived if the defendant agrees. This safeguard is not mentioned in the Nova Scotia rule and is currently not necessary in Nova Scotia. As the Nova Scotia rule requires an establishment of liability before the question of interim payments is considered by a court, the defendant's liability will be no secret to the trial judge.[160] This issue will, however, become relevant in Nova Scotia if the interim payment rule is expanded to include situations where the defendant's liability is still in question.

The Manitoba Law Reform Commission was in favour of the type of safeguard used in England. The Manitoba Commission suggested that disclosure of such information has the potential to prejudice the defendant while having no value as evidence.[161] A trial judge, the

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[159] English rule, note 5, above, r. 25.9.

[160] The Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 120, also prohibits details of certain voluntary advance payments from being revealed to judge or jury until judgment has been provided.

[161] Manitoba Report, note 10, above, at 17.

Manitoba Commission suggested, does not require such information in order to decide the issues before him or her.[162]

In the Discussion Paper, this Commission agreed that if the interim payment rule is to be expanded to include situations where liability is still in question, details concerning an interim payment should only be revealed at trial, after judgment has been provided on all outstanding issues between the parties. This is necessary, it was suggested, to ensure public confidence that the trial judge is not influenced by knowledge of an interim payment having been refused or made.[163] One way of doing this, it was suggested, would be to place all documents pertaining to the interim payment application in an envelope which is sealed, then left in the court file, with instructions that the envelope not be opened until after trial judgment. A potential problem, though, is that the mere presence of the envelope could alert the trial judge to the possibility of an interim payment having been made. The Commission invited comments on what means would be appropriate for ensuring that details relating to interim payment are not disclosed to a trial judge until after judgment is given.

Those commentators who provided feedback agreed that if the interim payment rule is to be expanded, then details concerning an interim payment should only be disclosed to the trial judge after judgment was provided. Some commentators suggested that interim payment rulings should be treated in the same fashion as offers to settle, with relevant documents not forming part of the trial court's file. These commentators also pointed out that as interim payment applications are held in open court, it would also be necessary to apply a publication ban until trial or settlement.

The Commission is of the view that the treatment of offers to settle is comparable to that of interim payments, in terms of the need to protect the parties' interests, by ensuring details are not disclosed to the trial judge until settlement or judgment has been achieved. The Commission also agrees that details involving interim payment could be published, but only after the proceedings are over. In the meantime, ordinarily a publication ban would apply. The Commission considers it appropriate, nonetheless, to allow courts in certain instances to waive the requirement for non-disclosure. For example, the parties may have no objection to details of an interim payment being revealed to the trial judge. This is acknowledged in part by the English rule, which restricts disclosure to the trial judge of details concerning an

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[162] Once judgment is provided, and if the defendant is found to be liable, the trial judge will need access to details of the interim payment order, to credit the defendant for any amount already paid and to determine whether an overpayment occurred at the interim payment stage. Such information would also be required if one defendant, who has provided more than his or her share of an interim payment, seeks contribution from another defendant. See Part III.12, below.

[163] This would be similar in effect to a current rule which requires the fact of an offer to settle having been made not to be brought to the court's attention until questions of liability and damages are decided: see Nova Scotia, *Rules of Civil Procedure*, r. 41A.05(2).

interim payment, unless the defendant agrees.[164] The Commission recommends that if the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning interim payment of damages should ordinarily not be disclosed to the trial judge until after the judgment is given. The Commission also recommends that courts should have the discretion to waive the restrictions on revealing details pertaining to interim payment.

The Commission recommends:

- If the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning interim payment of damages should ordinarily not be disclosed to the trial judge until after the judgment is given.
- Courts should have the discretion to waive the restrictions on revealing details pertaining to interim payment.

11. Timing, form and variation of interim payment of damages orders

a. Timing of payment

Another issue is the relevant time at which an interim payment should be calculated, namely whether it should be limited to damages incurred by the date of an application, or whether a judge will be entitled to calculate damages that should accrue up to and including the time of trial. In Nova Scotia,[165] England,[166] Scotland,[167] and South Australia,[168] interim payment can be based on the amount that a judge hearing an application believes will be awarded at the trial. The Nova Scotia rule, for instance, refers to an amount "not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff...."[169] An interim payment therefore need not be limited to damages which have been incurred up to the date of the application.

The Western Australia Law Reform Committee recommended that interim payment should include special damages incurred up to the time of a motion, as well as loss of earnings and

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[164] English rule, note 5, above, r. 25.9.

[165] Nova Scotia rule, note 5, above.

[166] English rule, note 5, above, r. 25.7(4).

[167] Scottish rule, note 5, above, r. 43.9(3)(b).

[168] South Australia rule, note 5, above, s. 30B(2)(a).

[169] Nova Scotia rule, note 5, above.

expenses expected to be incurred prior to trial.[170] The Manitoba Law Reform Commission agreed that a motion judge should not be restricted to award damages which have been incurred up to the date of the motion. Rather, the Manitoba Commission suggested, the judge should have discretion to award damages which are expected to be incurred between the date of the motion and the anticipated date of trial.[171]

Keeping in mind the variety of circumstances that can surround an action for damages, this Commission's Discussion Paper took the view that a judge, in granting an application for interim payment, should have considerable discretion. This would enable a judge to ensure that the specifics of the interim payment take into account all relevant circumstances. The Commission therefore suggested that a court should have the discretion to order an interim payment which takes into account damages expected to be incurred up to the anticipated date of the trial.[172] In all cases, the exact date of the trial may not be known. By enlisting the help of those court officials involved in scheduling court sessions, it was also suggested, obtaining a rough idea of when a trial will be held would be possible.

b. Form of payment

An additional issue involves whether interim payment must take the form of a lump sum or whether it can be made in a series. In Nova Scotia, South Australia, and Scotland, there is no restriction on how an interim payment is to be made. The English rule expressly allows a court to order an interim payment to be made in one sum or in installments.[173] The Western Australia Law Reform Committee recommended that courts should have the discretion to order interim payments to be made in the form of a lump sum or in a series.[174] The Manitoba Law Reform Commission agreed, recommending that a motion judge should be able to order the defendant to make an interim payment in a lump sum, periodic payments, or a combination thereof.[175] The Parliament of Victoria Law Reform Committee reached the same conclusion.[176]

Similarly keeping in mind the variety of circumstances that might prevail, this Commission took the position in the Discussion Paper that a court should be able to order a defendant to make an interim payment in the form of a lump sum, periodic payments, or a combination thereof.

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[170] Western Australia Report, note 4, above, at 10.

[171] Manitoba Report, note 10, above, at 15.

[172] What the Commission had in mind here, but which, through oversight, did not appear in the suggestion, was that damages could be taken into account up to and including trial.

[173] English rule, note 5, above, r. 25.6(7).

[174] Western Australia Report, note 4, above, at 10.

[175] Manitoba Report, note 10, above, at 16.

[176] Note 40, above, para. 7.47.

c. Additional orders

Circumstances might change between the time of an application for interim payment and the time of trial. The Nova Scotia rule is silent on the issue of additional interim payments to take into account changed circumstances. In *MacNeil*, the court indicated that the plaintiff had a right to reapply for an interim payment,[177] and in *Bogaczewicz*, the court stated there did not appear to be any reason why the rule should preclude more than one application from being made.[178] In England,[179] Scotland,[180] and South Australia,[181] subsequent applications relating to interim payments are possible.

The Manitoba Law Reform Commission recommended that a party should be able to make a subsequent motion for an order or variation of an order pertaining to interim payment upon any ground which seems just, including a change of circumstances.[182] For example, damages actually incurred by a plaintiff may turn out to be greater than anticipated at the time of making an application. Conversely, damages may be lower than expected, which might lead a defendant to seek a change in an order.

This Commission's Discussion Paper agreed with the Manitoba Law Reform Commission's approach, as being consistent with allowing a judge considerable discretion in relation to interim payment. The Commission suggested that subsequent applications for an order or variation of an order pertaining to interim payment should be possible upon any ground which seemed just, including a change of circumstances.

Comments received on the timing, form and variation of interim payment orders were mixed. For instance, one commentator suggested that the more flexibility enjoyed by judges, the better the interim payment system would work. As a result, it was suggested that a judge should have discretion concerning what factors should be taken into account in determining the timing of the quantification of damages and the method in which the payment would be made. By contrast, other commentators suggested periodic interim payments and an ability to vary an interim payment award should be avoided, as they would use judicial time and resources better spent arriving at a final outcome to a dispute. Another commentator suggested that in relation to the granting of additional orders or variations of orders, as the courts have made it clear plaintiffs have a right to reapply for an interim payment if necessary, there is no need to

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[177] Note 18, above, at 130.

[178] Note 14, above, at 10.

[179] English rule, note 5, above, r. 25.8.

[180] Scottish rule, note 5, above, r. 43.9(6).

[181] South Australia rule, note 5, above, s. 30B(6)(b).

[182] Manitoba Report, note 10, above, at 16-17. The Parliament of Victoria Law Reform Committee made a similar proposal: see note 40, above, para. 7.47.

change the existing rule in this regard. That commentator also did not consider there to be any need to change the wording of the rule as it pertains to the timing of calculating damages for the purpose of an interim payment, as well as the wording of the rule in relation to the courts' power to order an interim payment in the form of lump sum, periodic payments, or a combination thereof.

Having taken into account the comments received, the Commission affirms its suggestions made in the Discussion Paper on the timing of payment, its form, and additional orders. In terms of timing, the Commission remains of the view that a judge should be able to consider all relevant circumstances. In certain situations, it may be fair to base an interim payment on the amount of damages a plaintiff may be awarded at trial, rather than on the amount of damages the plaintiff claims to have suffered by the time of making an interim payment application. As a result, the Commission recommends that it should be possible for a court to award an interim payment based upon damages which are expected to be incurred up to and including trial.

In terms of the form of an interim payment, as well as the availability of additional orders, the Commission is of the view that to promote fairness, courts should be accorded a great deal of discretion. Nonetheless, to identify, in an amended rule, aspects of the court's discretion, is helpful, as it can point out to the parties potentially relevant factors, without binding the court. The Commission therefore recommends that a court should be able to order an interim payment to take the form of a lump sum, periodic payments, or a combination thereof. The Commission also recommends that a court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.

Feedback received also made it clear there are two aspects to timing, one of which was not mentioned in the Discussion Paper. In relation to the time at which a plaintiff could apply for an interim payment, those commentators who provided feedback agreed that at the least, there should be no application for interim payment before pleadings are closed. One commentator went further, suggesting that no interim payment be possible before oral discovery of a plaintiff is completed.

The New Brunswick *Insurance Act* permits an application to be made for interim payment at any time after an action for damages arising out of an accident is commenced.[183] By contrast, the New Brunswick *Rules of Court* do not seem to provide any guidance about when an interim payment application may be made.[184] In England, an application may not be made before the end of the period given to the defendant to acknowledge *service* of notice pertaining to the

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[183] N.B. *Insurance Act*, note 5, above, s. 256.6(1).

[184] New Brunswick, note 5, above.

plaintiff's action.[185] The Scottish rule allows an interim payment application to occur at any time after the defendant has filed his or her defence.[186] The New South Wales rule permits an application at any stage of the proceedings,[187] while in South Australia, an application may be made at any time after summary judgment.[188]

The Commission does not consider it realistic to connect the availability of an interim payment application to the end of discovery, as discovery proceedings are never actually over. Even after the end of formal discovery proceedings, it is still possible, and actually required, for a party to bring to the attention of the court any relevant documents which come into that party's possession. Rather than allowing an interim payment application to be made after the end of discovery, the Commission recommends that the relevant time from which to make an interim payment application available should be the close of pleadings.

The Commission recommends:

- It should be possible for a court to award an interim payment based upon damages which are expected to be incurred up to and including trial.
- A court should be able to order an interim payment to take the form of a lump sum, periodic payments, or a combination thereof.
- A court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.
- The relevant time from which to allow an interim payment application to be made should be the close of pleadings.

12. Should interim payment of damages be taken into account by the trial judge?

Prior to awarding a final amount of damages, a trial judge will have to take into account any interim payment made by the defendant. Any amounts already paid will have to be deducted from the final damages award. To fail to do so would mean that a defendant who has made an

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[185] English rule, note 5, above, r. 25.6(1). Service involves the delivery of a document to a person who is thereby officially notified of an action or some step in it: see R.S. Vasan, ed., *The Canadian Law Dictionary* (Don Mills: Law and Business Publications (Canada), 1980) at 349.

[186] Scottish role, note 5, above, r. 43.9(1).

[187] N.S.W. rule, note 5, above, s. 76E(2).

[188] South Australia rule, note 5, above, s. 30B(2).

interim payment would be paying some or all of the damages twice. If the Nova Scotia interim payment rule is to be expanded, to allow for interim payment where liability is still in question, then it is possible that a defendant who made an interim payment will be found not liable at trial. In such a situation, at the time of trial judgment the plaintiff will no longer have any entitlement to the interim payment, which will have to be returned to the defendant.

The relevant rules in England,[189] Scotland,[190] and New South Wales[191] are wide enough to permit financial adjustments between the parties, which would include taking into account any interim payment made by the defendant. These rules also specifically empower their respective courts to order a repayment. In South Australia,[192] courts are required to credit against a final damages award any interim payment made by the defendant. The Manitoba Law Reform Commission agreed with a court's ability to take into account what a defendant has paid by the time of trial and to order repayment if necessary.[193] The Parliament of Victoria Law Reform Committee made a similar proposal.[194]

In the Discussion Paper, this Commission took the position that it would be unfair for defendants to be required to pay all or a portion of damages twice. It would also be unjust for a plaintiff to retain an interim payment, awarded prior to a determination of liability, if the defendant is held at trial not to be liable for the plaintiff's damages. At the time of trial judgment, in calculating a final damages award, it was therefore suggested that the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant. No change to the law, it was suggested, would be required to bring this into effect. The Commission took the view that the Nova Scotia *Civil Procedure Rules* currently empower courts to credit a defendant for the amount of any interim payments made and to order a plaintiff to repay the defendant in the event of an overpayment of damages.[195] The current law in Nova Scotia also allows a defendant who has paid more than his or her fair share of damages to seek contribution from other people responsible for the plaintiff's damages.[196] As a result, the Commission did not suggest any change to empower courts to make adjustments between the parties.

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[189] English rule, note 5, above, r. 25.8.

[190] Scottish rule, note 5, above, r. 43.10(a).

[191] N.S.W. rule, note 5, above, s. 76G(2).

[192] South Australia rule, note 5, above, s. 30B(5).

[193] Manitoba Report, note 10, above, at 18.

[194] Note 40, above, para. 7.49.

[195] R. 33.01(1)(f), in the context of assessing damages, empowers the court to "give such other directions as it thinks just."

[196] *Tortfeasors Act*, R.S.N.S. 1989, c. 471, s. 4.

This issue did not generate much commentary, but those remarks received were in favour of the Commission's suggestions, which it affirms. As a matter of fairness, plaintiffs should not be paid a portion of damages more than once, nor should a plaintiff retain an amount, awarded in the form of an interim payment, to which he or she is no longer entitled. As a result, the Commission recommends that at the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant. As Nova Scotia law currently empowers courts to make adjustments between the parties, no suggested change is needed to bring this into effect.

The Commission recommends:

- At the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant.
- As Nova Scotia law currently empowers courts to make adjustments between the parties, no suggested change is needed to bring this into effect.

13. Should changes to the availability of interim payment of damages take the form of legislation or amended rules?

In a previous Final Report,[197] the Commission took the position that changes to the law should be made through legislation, though amendments to the *Civil Procedure Rules* may also be required. The Commission indicated that changes to the law by amending the Rules do not receive the kind of scrutiny and public debate that precedes the adoption of legislation. The Commission added that amendments to the Rules may be made in conjunction with legislation, but should not be a substitute for legislation. In 1996, interim payment of damages became available by way of amendments to the Rules. In the Discussion Paper, the Commission invited comments on whether reform of the law concerning interim payment of damages should be made through legislation, the *Civil Procedure Rules*, or both.

Comments received on this issue were mixed. On one hand, it was suggested that as interim payments are matters of *procedure*, which involves means of enforcing rights,[198] a change to the *Civil Procedure Rules* would be necessary to reform the interim payment system. It was

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[197] Law Reform Commission of Nova Scotia, *Mortgage Foreclosure and Sale in Nova Scotia* (Halifax: The Commission, 1998) (Final Report) at 60.

[198] Dukelow & Nuse, note 1, above, at 1042.

also suggested, however, that allowing changes to be undertaken through the legislative process would allow for the consideration of all relevant factors needed to provide a balance between the rights of plaintiffs and the rights of defendants in the litigation process.

The Commission does not take a strong position on what form suggested changes to the interim payment system should assume. Making changes to the *Civil Procedure Rules* has the advantage of speed and clarity, in that any changes would be made to a set of rules already in place. The *Civil Procedure Rules* are written by the judges of the Court of Appeal and of the Nova Scotia Supreme Court. To make the changes part of the legislative process, though, would involve the advantage of being able to take into account perspectives from people outside the judiciary on this and related changes.[199] For example, whether to expand the interim payment rule might be considered in conjunction with an examination of Section B benefit levels.

The Commission recommends that changes to the interim payment rule could be made through both legislation and the *Civil Procedure Rules*. The impetus for change could come from general principles, set out by the Legislature, but the actual wording of the amended rule could be left to the judges, who would be entrusted with applying the new rule.

The Commission recommends:

- Reform of the law concerning interim payment of damages should be made through both legislation and the *Civil Procedure Rules*.

[199] Like Nova Scotia, Manitoba has both legislation and court rules to determine court procedure. The Manitoba Law Reform Commission recommended that interim payment of damages provisions be adopted in that province through legislative changes: note 10, above, at 27-28. Unlike Nova Scotia, though, Manitoba had no interim payment rules in place at the time of the Manitoba Commission's report.

IV SUMMARY OF RECOMMENDATIONS

The Commission recommends that:

1. **Should interim payment of damages be available if liability has not yet been established?** [pages 12 - 23]

- The Nova Scotia rule pertaining to interim payment of damages should be expanded, to allow for interim payment where liability is still in question. The rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.

- To satisfy a court in this context means that a plaintiff will "almost certainly succeed on the question of liability at least to some extent."

- Without an examination of the nature of summary judgment and of the possible effects on civil litigation generally, it would be premature, in the context of a study of the interim payment rule, to make any recommendations for changes to the summary judgment rule.

- The availability of separate trials, on liability and on damages, does not on its own preclude the need for an expanded interim payment rule.

- As a policy issue, whether or not to increase the level of Section B benefits is best left to the Government, to be decided after widespread consultation and legislative debate.

2. **Should interim payment of damages be restricted to a particular type of action?** [pages 23 - 25]

- A liberal approach should be used in applying the interim payment rule, which should be available in all types of civil proceedings.

3. **Should both special and general damages be available for an interim payment?** [pages 25 - 28]

- Both special and general damages should be available, if relevant, for inclusion in an interim payment.

4. **Should a plaintiff have to demonstrate need?** [pages 28 - 31]

- The interim payment rule should not require a plaintiff to show need.

5. **Should a plaintiff's contributory negligence prevent access to interim payment of damages?** [pages 31 - 33]

- A plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

6. **Should other factors be used to lessen or prevent interim payment of damages?** [pages 33 - 36]

- Mitigation of damages should be included as a factor which may be taken into account by a court when deciding the amount of an interim payment of damages.

- Set off, counter-claims, and cross-claims should be retained as factors to be taken into account by a court when deciding the amount of an interim payment of damages.

7. **Should specific formulas be used to determine the amount of interim payment of damages?** [pages 36 - 37]

- The interim payment rule should not include any specific formulas for determining the amount of payment.

8. **Should the interim payment rule apply only to defendants with adequate financial means?** [pages 37 - 39]

- The interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.

- A defendant who wishes to claim that he or she does not have sufficient means and resources should be required to prove the details of his or her financial situation.

9. **Should the presence of multiple defendants affect the availability of interim payment of damages?** [pages 39 - 41]

- In order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

10. **Should details of an interim payment of damages order be disclosed at trial?** [pages 41 - 43]

- If the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning interim payment of damages should ordinarily not be disclosed to the trial judge until after the judgment is given.

- Courts should have the discretion to waive the restrictions on revealing details pertaining to interim payment.

11. **Timing, form and variation of interim payment of damages orders** [pages 43 - 47]

- It should be possible for a court to award an interim payment based upon damages which are expected to be incurred up to and including trial.

- A court should be able to order an interim payment to take the form of a lump sum, periodic payments, or a combination thereof.

- A court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.

- The relevant time from which to allow an interim payment application to be made should be the close of pleadings.

12. **Should interim payment of damages be taken into account by the trial judge?** [pages 47 - 49]

- At the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant.

- As Nova Scotia law currently empowers courts to make adjustments between the parties, no suggested change is needed to bring this into effect.

13. **Should changes to the availability of interim payment of damages take the form of legislation or amended rules?** [pages 49 - 50]

- Reform of the law concerning interim payment of damages should be made through both legislation and the *Civil Procedure Rules*.

Appendix A

List of Suggestions from Discussion Paper

The Commission suggested that:

1. The Nova Scotia rule pertaining to interim payment of damages should be expanded, to allow for interim payment where liability is still in question. The rule could be appropriately modified, in order to permit interim payment where liability is still in question, by requiring a court to be satisfied that the plaintiff will succeed in an action at trial.

2. The interim payment rule should continue to be available for personal injury actions.

3. The Commission invites comment on what types of actions, in addition to personal injury actions, may or may not be suitable for the availability of interim payment of damages.

4. Both special and general damages should be available, if relevant, for inclusion in an interim payment.

5. The interim payment rule should not require a plaintiff to show need.

6. A plaintiff's contributory negligence should not by itself prevent access to interim payment of damages, but it should be retained as a factor to be taken into account by the court.

7. Mitigation of damages should be included as a factor which may be taken into account by a court when deciding the amount of an interim payment of damages.

8. Set off, counter-claims, and cross-claims should be retained as factors to be taken into account by a court when deciding the amount of an interim payment of damages.

9. The interim payment rule should not include any specific formulas for determining the amount of payment.

10. The interim payment rule should be confined to situations where defendants seemingly have sufficient resources with which to make an interim payment.

11. A defendant who wishes to claim that he or she does not have sufficient means and resources should be required to prove the details of his or her financial situation.

12. In order to obtain an interim payment against a particular defendant, a plaintiff must satisfy the court that he or she will, or is likely to, recover damages at trial from that defendant.

13. If the interim payment rule is to be expanded to include situations where liability is still in question, then information concerning interim payment of damages should not be disclosed to the trial judge until after the judgment is given.

14. The Commission invites comments on what means would be appropriate for keeping interim payment details undisclosed until the relevant time.

15. It should be possible for a court to award an interim payment based upon damages which are expected to be incurred up to the anticipated date of trial.

16. A court should be able to order an interim payment to take the form of a lump sum, periodic payments, or a combination thereof.

17. A court should be able to grant an additional order or variation of an order pertaining to an interim payment upon any ground which seems just, including a change of circumstances.

18. At the time of trial judgment, in calculating a final damages award, the court should take into account any interim payment made by the defendant and should make any necessary adjustments between the parties, including, if necessary, an order for the plaintiff to repay the defendant. As Nova Scotia law currently empowers courts to make adjustments between the parties, no suggested change is needed to bring this into effect.

19. The Commission invites comments on whether reform of the law concerning interim payment of damages should be made through legislation, the *Civil Procedure Rules*, or both.

Appendix B
England & Wales, *Civil Procedure Rules 1998*, rr. 25.6 - 25.9

Interim payments - general procedure

25.6 - (1) The claimant may not apply for an order for an interim payment before the end of the period for filing an acknowledgement of service applicable to the defendant against whom the application is made.

(2) The claimant may make more than one application for an order for an interim payment.

(3) A copy of an application notice for an order for an interim payment must -

(a) be served at least 14 days before the hearing of the application; and

(b) be supported by evidence.

(4) If the respondent to an application for an order for an interim payment wishes to rely on written evidence at the hearing, he must -

(a) file the written evidence; and

(b) serve copies on every other party to the application,

at least 7 days before the hearing of the application.

(5) If the applicant wishes to rely on written evidence in reply, he must -

(a) file the written evidence; and

(b) serve a copy on the respondent,

at least 3 days before the hearing of the application.

(6) This rule does not require written evidence -

(a) to be filed if it has already been filed; or

(b) to be served on a party on whom it has already been served.

(7) The court may order an interim payment in one sum or in instalments.

Interim payments - conditions to be satisfied and matters to be taken into account

25.7 - (1) The court may make an order for an interim payment only if -

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;

(c) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment; or

(d) the following conditions are satisfied -

(i) the claimant is seeking an order for possession of land (whether or not any other order is also sought); and

(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for the defendant's occupation and use of the land while the claim for possession was pending.

(2) In addition, in a claim for personal injuries the court may make an order for an interim payment of damages only if -

(a) the defendant is insured in respect of the claim;

(b) the defendant's liability will be met by -

(i) an insurer under section 151 of the Road Traffic Act 1988; or

(ii) an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or

(c) the defendant is a public body.

(3) In a claim for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if -

(a) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable); and

(b) paragraph (2) is satisfied in relation to each of the defendants.

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The court must take into account -

(a) contributory negligence; and

(b) any relevant set-off or counterclaim.

Powers of court where it has made an order for interim payment

25.8 - (1) Where a defendant has been ordered to make an interim payment, or has in fact made an interim payment (whether voluntarily or under an order), the court may make an order to adjust the interim payment.

(2) The court may in particular -

(a) order all or part of the interim payment to be repaid;

(b) vary or discharge the order for the interim payment;

(c) order a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment.

(3) The court may make an order under paragraph (2)(c) only if -

(a) the defendant to be reimbursed made the interim payment in relation to a claim in respect of which he has made a claim against the other defendant for a contribution, indemnity or other remedy; and

(b) where the claim or part to which the interim payment relates has not been discontinued or disposed of, the circumstances are such that the court could make an order for interim payment under rule 25.7.

(4) The court may make an order under this rule without an application by any party if it makes the order when it disposes of the claim or any part of it.

(5) Where -

(a) a defendant has made an interim payment; and

(b) the amount of the payment is more than his total liability under the final judgment or order,

the court may award him interest on the overpaid amount from the date when he made the interim payment.

Restriction on disclosure of an interim payment

25.9 The fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided unless the defendant agrees.

Appendix C

S. 265.6, New Brunswick, *Insurance Act*, R.S.N.B. 1973, c. I-12

265.6(1) At any time after an action for damages arising out of an accident is commenced, the plaintiff may apply to a judge of The Court of Queen's Bench of New Brunswick for an order requiring the defendant to make an advance payment of special damages.

265.6(2) The judge may make an order under subsection (1) on any terms he or she thinks appropriate, if the judge is satisfied that the plaintiff will prove that the defendant is liable for those damages.

265.6(3) The judge may order that payment under subsection (1) be made by lump sum, by instalment or by a combination of both.

265.6(4) In calculating the amount of an advance payment, the judge may take into account any circumstances he or she considers relevant including

(a) the amount of special damages already incurred or likely to be incurred before judgment by the plaintiff,

(b) the amount, if any, counterclaimed by the defendant,

(c) the extent, if any, to which the plaintiff may be found to be contributorily negligent,

(d) any failure by the plaintiff to mitigate the amount of special damages, and

(e) the needs and resources of the plaintiff and the means of the defendant.

265.6(5) This section applies only to accidents occurring on or after the commencement of this section.

Appendix D

List of People and Organizations Who Commented on the Discussion Paper or on Rule 33

Oral comments:

Trevor Wheeldon	Lawyer, MacMillan Wheeldon

Written comments:

Peter D. Darling	Lawyer, Huestis Ritch
W. Dale Dunlop	Lawyer, Walker, Dunlop
D.W.J. Forgeron	Vice President, Atlantic Insurance Bureau of Canada
Jason P. Gavras	Lawyer, Pavey Gavras
Michael F. LeBlanc	Lawyer, Boyne Clarke
Hugh R. McLeod	Lawyer, Sole Practitioner
Tim Rattenbury	Lawyer, New Brunswick Department of Justice
W. Augustus Richardson	Lawyer, Huestis Ritch